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IN THE

Supreme Court of the United States

No. 74-1222

CHARLES L. WOLFF, JR., Warden,
Nebraska Penal and Correctional Complex,
Petitioner,

vs.

DAVID L. RICE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PAUL L. DOUGLAS,
Attorney General of Nebraska,

MELVIN KENT KAMMERLOHR,
Assistant Attorney General of Nebraska,

2119 State Capitol,
Lincoln, Nebraska 68509
Telephone: (402) 471-2211

Attorneys for Petitioner.

COCKLE PRINTING CO., 1822 ST. MARY'S AVE., OMAHA

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PETITION FOR WRIT OF CERTIORARI

Your petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above entitled case on January 28, 1975.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is not yet reported. A copy of

such opinion is separately attached hereto in Appendix No. 1.

The opinion of the United States District Court for the District of Nebraska which was affirmed by the United States Court of Appeals for the Eighth Circuit also is not yet reported and a copy thereof is set forth hereto in Appendix No. 2.

GROUNDS FOR JURISDICTION

The judgment sought to be reviewed was entered by the United States Court of Appeals for the Eighth Circuit on January 28, 1975. Appendix 1. This judgment affirmed the judgment of the United States District Court for the District of Nebraska entered July 5, 1974 and March 30, 1974.

Petition for rehearing and suggestion for rehearing en banc was denied by the United States Court of Appeals for the Eighth Circuit on February 19, 1975, copy of which is set forth in Appendix 3.

The statutory provision believed to confer on the United States Supreme Court jurisdiction to review the judgment in question by writ of certiorari is 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Should the suppression or exclusionary rule be modified to admit relevant, competent evidence obtained under the most exigent circumstances in the exercise of the utmost good faith by the police and courts where use of the rule could serve no deterrent effect or any other valid purpose?

2. Did not this court in *Michigan v. Tucker*, — U. S. —, 41 L. Ed. 2d 182, 94 S. Ct. 2357, modify the excusionary rule in relation to the Fifth Amendment and by implication the Fourth (or if not, should it not), when its invocation can only punish an innocent error and can have no deterrent or other useful purpose?

3. May it not be reasonable under extremely exigent conditions which portend further bombing, killing and civil disorder for police to enter a known hangout of a youth for whom the police have a valid arrest warrant for allegedly setting a booby trap bomb which killed a police officer, injured others and destroyed a house and at which time the police also have a warrant (later held invalid) to search said known hangout for explosives, when the police do not have probable cause to believe the youth is or is not there at the time of entry?

4. When police are in possession of sufficient facts to obtain a valid search warrant but fail to set forth enough in the affidavit or other evidence before the issuing magistrate, and the warrant issues anyway, may the deficiency be cured by additional probable cause evidence at the suppression hearing?

5. When the state courts find a search warrant valid and thus never consider the validity of the search without a warrant, although presented as an alternative in briefs on direct appeal to the State Supreme Court, shouldn't the Federal District Court send the issues of search without a warrant and probable cause to enter to execute an arrest warrant back to the state trial court for exhaustion when said Federal Court finds the search warrant invalid in a Section 28 U. S. C. 2254 proceeding?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

(1) Fourteenth Amendment, United States Constitution:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

"Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

"Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

"Section 4. The validity of the public debt of the United States authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

"Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

(2) Fourth Amendment, United States Constitution:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

(3) 28 U. S. C. § 2254:

"(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

"(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

"(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

"(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

"(1) that the merits of the factual dispute were not resolved in the State court hearing;

"(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

"(3) that the material facts were not adequately developed at the State court hearing;

"(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

"(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

"(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

"(7) that the applicant was otherwise denied due process of law in the State court proceeding;

"(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

"And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

"(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall

produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

"(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding."

(4) Ninth Amendment, United States Constitution:

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

(5) Tenth Amendment, United States Constitution:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

STATEMENT OF THE CASE

David L. Rice commenced this 28 U. S. C. § 2254 proceeding in the Federal District Court for the District of Nebraska contending primarily that his conviction of first

degree murder was invalid because it was based in part upon evidence consisting of dynamite, dynamite caps, and other tools and paraphernalia taken from his home at 2816 Parker Street, Omaha, Nebraska and dynamite particles found in his clothing at the police station which were the result of an illegal search and seizure and the fruits thereof and should have been suppressed. David L. Rice was the minister of information of the National Committee to Combat Fascism, an offshoot of the Black Panthers, and both names were used interchangeably in the case.

His conviction for first degree murder together with one Edward Poindexter, Chairman of the National Committee to Combat Fascism, was the outgrowth of the events discussed below.

About 2:05 a.m., August 17, 1970, the radio dispatcher at the Omaha, Nebraska Police Department received a call from a 911 operator indicating that a woman was screaming at 2865 Ohio Street, a vacant house. He dispatched two patrol cars and another patrol car subsequently arrived at said address. The officers entered the house and began to look around. There was a suitcase lying flat in the doorway which blocked the entire doorway and the officers had to step over it to enter. Officer Minard was directly over the suitcase when it exploded, killing him, and injuring several other officers and demolishing the house.

The Omaha Police Department for a two-year period before the bombing had built a file on the National Committee to Combat Fascism including newspapers published by said organization and were familiar with a number of

articles in said newspapers written by Edward Poindexter and David L. Rice advocating violence against the Omaha Police Department including killing of policemen.

A number of witnesses saw Duane Peak, a 15 year old member of the National Committee to Combat Fascism, carrying a heavy suitcase generally identified as similar to the one used in the bombing and he had warned a number of other people to keep away from the suitcase. In addition, the voice on the tape at police headquarters of the person making the 911 call that a woman was screaming at the place of the bombing was identified by a number of persons as that of Duane Peak. Donald Peak, Duane's brother, told the police about 1:45 p.m., August 22, 1970, that his brother Duane admitted to him the placing of the boobytrapped bomb and that Duane was transporting the bomb for someone in the Black Panther party. A report filed by two Omaha policemen, on Saturday, August 22, 1970, at 6:30 o'clock p.m., stated that Duane Peak's sister, Teresa Arlene, age 19 years, earlier told them that the day before the funeral of Officer Minard, Duane Peak was at her home and told her that he put the bomb in the house that killed the policeman and that he had carried the suitcase from the Panther headquarters. There are voluminous police reports supporting many of the contentions all of which were admitted in evidence by stipulation.

Late in the afternoon of August 22, 1970, arrest warrants were issued for Duane Peak and Edward Poindexter on murder charges.

Late that afternoon a task force set out from the Omaha Police Department to execute the arrest warrants

and first searched the Black Panther or NCCF headquarters on Ohio Street in Omaha where they found barricaded windows and doors and a large amount of ammunition and firearms. They next went to Poindexter's house at 3528 North 29th Street in Omaha and to the house of Duane Peak's cousins, Frank and Will Peak, at all of which places they were unsuccessful. They then proceeded to the premises of appellee David L. Rice at 2816 Parker Street. The house where Rice resided was more than a residence. There was a spoked hubcap hanging above the door and directly above that there was a black flag flying day and night; there was a green light burning at night, and in the windows there were posters of known Black Panther figures such as Huey Newton and others.

The police knew that on various occasions numerous people stayed at the Rice house and that Duane Peak was frequently there.

During the period of five days between the bombing and the search for Peak and Poindexter the police department was working extra shifts, they were very concerned for the safety of the public and themselves from further bombings, that the NCCF might eliminate Duane Peak before the police could find him and about entering the sensitive neighborhood area around the Rice premises.

When the police arrived at the Rice house the lights were on and the television set was playing inside the house. Officers knocked at the door and received no answer. The officers in charge then conferred and having information that explosives, including dynamite,

might be found in the Rice premises (and knowing the history of Rice and his philosophies previously recited) decided to have the house surrounded while the two officers left to attempt to get a search warrant. They obtained a search warrant from a magistrate who is admitted to the Nebraska Bar and returned in about an hour and finding the house still empty, entered it, looking for Duane Peak to execute the arrest warrant and thinking they had a right to search under the search warrant. The evidence which was obtained, mentioned earlier, was all in plain view in the house and was most probative.

Five days later, David Rice turned himself into the Omaha police. The usual procedure for taking and cataloging his clothes, giving him a shower and jail clothes was followed and on the same date his clothing was sent to Washington, D. C., for analysis and dynamite particles were found in the cuffs of his clothing.

The state district court and the Supreme Court of Nebraska held the search warrant valid. The Federal District Court for the District of Nebraska found the affidavit for search warrant insufficient. Although the issue of the validity of the search without a warrant or the entry on the premises looking for Duane Peak was presented by both sides to the state Supreme Court, it was never necessary for the state courts to go into this issue.

The Federal District Court after finding the affidavit for a search warrant invalid further found that it was not necessary to send the case back to the state trial court to take additional testimony and pass upon the issues of probable cause to enter to execute the arrest warrant or

probable cause to make a search without a warrant to meet exhaustion requirements.

The Federal District Court then held an additional evidentiary hearing on these issues and held in effect that the police must have had probable cause to believe Duane Peak was on the premises at the time of the entry and that this requirement was not affected by the exigency of the circumstances nor the good faith of the officers. The court refused to consider the question of reasonableness in view of the extreme emergency interests of the state as compared to the relatively minor invasion into an unoccupied house with lights and television on and no response to the knock. The United States Court of Appeals for the Eighth Circuit affirmed stating in part that the exclusionary rule was still in effect and that it had no authority to disregard it.

REASONS FOR ALLOWING THE WRIT

1. The Exclusionary Rule Should Be Modified.

Clearly, the kinds of reasons for granting a petition set forth in Rule 19 of this court governing review by certiorari do not apply in a case such as this; but we most urgently contend that the reasons why this court should grant this petition are as compelling as any suggested by said Rule 19 and, when the ramifications of the exclusionary rule are considered, the reasons for granting this petition rank alongside, we contend, some of the most important and serious concerns of this court and this nation. Untold guilty defendants go free; crime continues its forward march; court calendars at all levels, not to mention police departments, prosecutors' and attor-

neys' general offices become more jammed, and state-federal relations become more strained.

Obviously the deterrence goal of the exclusionary rule was completely nonexistent or irrelevant to the present case. The police acting under terrific pressure from public reaction, indignation, fear, anger and probably revenge, nevertheless did everything in their power to try to comply with the law and yet stubbed their toe (arguable) in attempting to get a search warrant, and even this would be disputed by nine state court judges. Obviously when the rule is so difficult to comply with that it takes reflection by nine jurists after the fact to determine it, there can be no element of deterrence of the police who are trying to comply. Deterrence should be a goal against police acting with ill will or bad faith but there is no hint of such an element in this case.

Of course, this court is well aware of the discussion of the problem by the Honorable Mr. Chief Justice Burger dissenting in *Bivens v. Six Unknown Federal Narcotics Agents,* 403 U. S. 388, 29 L. Ed. 2d 619, 91 S. Ct. 1999 (June 1971) and particularly the illogic of inflicting the same penalty of exclusion in all the various gradations of conduct of the police from good faith over to Gestapo tactics or in believing that the police will suffer from suppression; the prosecutor may suffer—certainly society and the nation suffers.

This court is also familiar with utterances of displeasure by individual members of this court not only with the exclusionary rule but with a system where a single federal court judge often overturns two or more tiers of state courts in Section 2254 cases not involving

any question of innocence or any other sound reason with any historical foundation; for example, Mr. Justice Powell, joined by Mr. Chief Justice Burger and Mr. Justice Rehnquist and partial agreement by Mr. Justice Blackmun in *Schneckloth v. Bustamonte,* 412 U. S. 218 at 250, 36 L. Ed. 2d 854, 93 S. Ct. 2041 (1973), and Mr. Justice Harlan, and Mr. Justice Stewart dissenting in *Kaufman v. United States,* 394 U. S. 217, 246 (with which Mr. Justice Blackmun also expressed agreement) advocating limitations on collateral attack in search and seizure cases. It would also be a monumental task to document the references and discussions of the honorable members of this court and the entire federal and state court systems of the inconsistencies and difficulties in attempting to reconcile or comply with *Aguilar v. Texas,* 378 U. S. 108; *Spinelli v. United States,* 393 U. S 410; *Draper v. United States,* 358 U. S. 307; *United States v. Harris,* 403 U. S. 573, and others together with the court's more recent refusals to extend the exclusionary rule in *United States v. Calandra,* — U. S. —, 94 S. Ct. 613 and *Michigan v. Tucker,* — U. S. —, 41 L. Ed. 2d 182, 94 S. Ct. 2357. It is obvious that the law is now so difficult that the most conscientious policeman or even prosecutor could have his valid evidence suppressed under the exclusionary rule even though trying with all of his ability to comply. There can be no deterrence under such circumstances.

As the court also well knows, there have been untold law review articles written concerning the exclusionary rule almost all of which agree there must be a better way absent bad faith on the part of law enforcement. There is available now, not only criticism but also con-

siderable documentation and some statistics showing its ineffectiveness in accomplishing the stated goal as well as a number of suggested alternatives. One such alternative, along the lines suggested by the Honorable Chief Justice Burger, was enacted in Nebraska in 1969 in the form of the Political Subdivision Tort Claims Act, Sections 23-2401 et seq., R. R. S. 1943 and the State Tort Claims Act, Sections 81-8,209 et seq., R. R. S. Neb. 1943, both waiving sovereign immunity. If need be, further sanctions such as fines could be enacted to restrict the individual policeman, his superiors and employers. Police officers could be suspended or fired. Further controls are suggested by the A. B. A. Standards, *The Urban Police Function*, Rule 5.4, Approved Draft, 1973.

Guilt or innocence should not be fused with the dissimilar question of a possible violation of the Fourth Amendment. The exclusionary rule is an attempt to vindicate the violation of a civil right in a criminal trial. They should be separated into two causes of action. Because of the rule this court and countless other courts have had to reverse convictions of some of the most heinous criminals in recent years through exclusion of hard, valid, probative evidence. As soon as a state case is brought by Section 2254 to Federal Court on a search and seizure question the positions of the parties change. The police go on trial to defend their methods used in gathering valid evidence while the guilt of the convicted petitioner is not at issue. Even though the criminal has had a suppression hearing and usually two reviews in state courts.

Now, we present a case where a known member who personally advocated violent killing of police, of an organization also advocating the killing of policemen, who was convicted of conspiracy to commit murder in the violent killing of a policeman, where there is no hint of innocence, who has had a suppression hearing and review, and who expects to go free by invocation of the exclusionary rule for a violation of the Fourth Amendment, done if at all, by police and a lawyer magistrate trying to comply with the law of arrest, search and seizure. The time to end the era of our history when such heinous criminals go free because of the operation of the exclusionary rule has come. There is practically unanimity in the segment of the legal field which deals with these matters that the rule is not working; that it must be changed; that it has had sufficient time to prove itself, and has failed. The past damage can't be repaired, but nothing can be gained by waiting any longer to effect the inevitable change we all know must come.

2. Should not Michigan v. Tucker, — U. S. —, 41 L. Ed. 2d 182, 94 S. Ct. 2357, Prevent Exclusion of the Evidence in This Case?

The application of the exclusionary rule has recently been put in a more realistic context in the opinion of the majority of this court in *Michigan v. Tucker*. With regard to the concept of penalizing police errors through the sanction of the exclusion of evidence, the court stated:

> "Just as the law does not require that a defendant receive a perfect trial, only a fair one, it cannot realistically require that policemen investigating serious crimes makes no errors whatsoever. The pres-

sures of law enforcement and the vagaries of human nature would make such an expectation unrealistic. Before we penalize police error, therefore, we must consider whether the sanction serves a valid and useful purpose." (94 S. Ct. at 2365.)

Tucker involved the question of whether the testimony of a third-party witness, whose existence became known to the police only through the statements of a rape suspect who had concededly been improperly advised of his rights pursuant to the requirements of *Miranda v. Arizona*, 384 U. S. 436 (1966), should have been suppressed.[1] The court held that the testimony of the third-party witness was properly admissible and not the "fruit of the poisonous tree."

Tucker then, was decided in the context of the application of the Fifth Amendment; however, the opinion makes it clear that the same consideration espoused by the court in the paragraph from the opinion quoted above are equally applicable to Fourth Amendment issues, such as those which are presented in the instant case. Thus, the court, in *Tucker*, continued:

> "We have recently said, in a search and seizure context, that the exclusionary rule's 'prime purpose is to deter future unlawful police conduct and thereby to effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures.'

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1 Actually **Miranda** had not been decided when the statements in question were obtained; however, since the interrogation took place pre-**Miranda** but the trial of the accused took place after the **Miranda** decision, **Miranda** was applicable to the case under the doctrine of **Johnson v. New Jersey**, 384 U. S. 719 (1966).

United States v. Calandra, slip op, p. 9, 38 L. Ed. 2d 561. We then continued:

> "'"The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effective available way—by removing the incentive to disregard it." Elkins v. United States, 364 U. S. 206, 217 [4 L. Ed. 2d 1669, 80 S. Ct. 1437] (1960).' United States v. Calandra, slip op, p. 9, 38 L. Ed. 2d 561. (Footnote omitted.)

"In a proper case this rationale would seem applicable to the Fifth Amendment context as well." (94 S. Ct. at 2365.)

There seems to be little doubt, then, that, in the eyes of the Supreme Court majority in *Tucker*, considerations of the validity of sanctions against the police in the form of exclusion of evidence apply equally to Fourth and Fifth Amendment questions.

Significantly, for the purposes of the issues presented in the instant case and for the arguments made in this brief, the court's opinion in *Tucker* stressed the fact that the concept of deterrence of improper police conduct, upon which the exclusionary rule is based, and the question of whether the police were acting in good faith are inextricably intertwined. The *Tucker* opinion continued:

> "The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in wilful, or at the very least, negligent conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care towards the right of an accused. Where the official action was pursued in

> complete good faith, however, the deterrence rationale loses much of its force." (94 S. Ct. at 2365.)

This pronouncement lies at the heart of the instant case. We submit that it would be difficult to discover a case in which the police were acting in *more* good faith or one in which the supposed deterrent against future "misconduct" would be *less,* should the decision of the lower court suppressing the evidence in this case be sustained.

There is even more reason for such abstention in a search and seizure case where there is no question as to the validity of the evidence seized as contrasted to the possibility of the confession being tainted in a Fifth Amendment case.

However, the United States Court of Appeals for the Eighth Circuit in the present case indicated in part III of its opinion that it was still bound by prior holdings of the United States Supreme Court rejecting a plea for an application of *Michigan v. Tucker* when it stated:

> "But the court in *Tucker* did not overturn the exclusionary rule, and it is still the law of the land. We are obliged to apply that law."

It then proceeded to allude to some negligent conduct on the part of the Omaha police in conducting a widespread investigation in disregard of the constitutional rights of others, whereas in reality, the evidence only shows the police went to the NCCF headquarters, Poindexter's home, the home of Frank and Will Peak, before going to the Rice premises. (*Rice v. Wolff, Jr.*, No. 74-1682, Appendix 1, p. 55). The only place entered prior to going to the Rice premises was the NCCF headquarters.

3. Should Not "Reasonableness" Under All the Circumstances Be the Test For A Search With a Valid Arrest Warrant?

Both the United States Court of Appeals for the Eighth Circuit and the United States District Court for the District of Nebraska hold steadfastly to the proposition that before a search of premises under a valid arrest warrant may be had the police must have probable cause to believe that the person to be arrested is on the premises at the time. (*Rice v. Wolff, Jr.*, Appendix 1, p. 51, Appendix 2, p. 81.) As the court well knows, Article IV of the United States Constitution is divided into two clauses, the first relating to the right of the people to be secure against "unreasonable" searches and seizures and the second, that no warrants shall issue but upon probable cause.

We respectfully contend that the key word regulating searches and seizures is the word "unreasonable." We believe the lower courts have put undue stress in this case upon "probable cause" to believe the suspect is on the premises at the time of entry rather than upon whether or not the entry was "reasonable." The interests of the state and citizens of Omaha under the circumstances far outweighed the interests of the defendant. The Court of Appeals and the District Court both say *Warden v. Hayden,* 387 U. S. 294, 18 L. Ed. 2d 782, 87 S. Ct. 1642 is not applicable because the officers in *Hayden* had probable cause to believe the suspect was on the premises. We say this court upheld an officer with no warrant opening the lid of a washing machine to look for weapons (the machine was too small to hide the suspect)

not because they had probable cause to believe the suspect was on the premises (although this goes to the reasonableness question), but because it was not unreasonable to open the lid of the washing machine under the circumstances. As this court there said:

> "The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others. Speed here was essential, and only a thorough search of the house for persons and weapons could have insured that Hayden was the only man present and that the police had control of all weapons which could be used against them or to effect an escape."

The same is true in the present case, except that in the present case the circumstances were even more exigent, the police had an arrest warrant and a search warrant, and the police opened the door of the premises rather than the door of the washing machine. Once they did so all of the evidence was in plain sight. The test of reasonableness has been met and a dogged adherence to a phrase that one must have "probable cause to believe the suspect is on the premises at the time" while it may be applicable to the second part of the Fourth Amendment concerning securing of a warrant or when time and danger are not factors, it should not be used to invalidate a "reasonable" entry, to exercise an arrest warrant which had already been secured upon "probable cause." The Court of Appeals and the lower court used against the Omaha police the fact that they delayed the entry to obtain a search warrant saying this shows there was not exigent circumstances. Such reasoning not only punishes the police for trying to comply with what they

conceived the law to be in obtaining a warrant when possible, but also overlooks the fact that the lights in the house were on, the television was playing and the police who remained to guard the premises could see inside the house that there were many other units of the Omaha police following leads and working on the case around the city in the hopes of prevent further killings. The whole Omaha Police Department did not come to a standstill while the Rice premises were under surveillance as the opinions indicate.

4. May Additional Facts be Presented at the Suppression Hearing to Bolster and Validate the Original Affidavit For a Search Warrant?

In *Spinelli v. United States,* 393 U. S. 410, 21 L. Ed. 2d 637, 89 S. Ct. 584, this court cited *Draper v. United States,* 358 U. S. 307, 3 L. Ed. 2d 327, 79 S. Ct. 329, as an appropirate example of probable cause. It there said:

> "The detail provided by the informant in Draper v. United States, 358 U. S. 307 (1959), provides a suitable bench mark."

The court went on to point out that the government informant did not state the way in which he had obtained his information but he did describe with minute particularity the clothes that Draper would be wearing, the train he would arrive on and other details. And, that independent police work corroborated much more than one small detail that had been provided by the informant. Upon meeting the Denver train on the second morning specified by the informer the police saw a man whose dress corresponded precisely to the informant's description and since the report was of a sort which, in experience, may be

recognized as having been obtained in a reliable way, the court stated that probable cause had been established.

In the present case at the time of making the affidavit for the search warrant, the police department had ample information to constitute probable cause for the issuance of the warrant, but much of the information was omitted from the affidavit because of the extreme volume of police reports and pressure of time. At the hearing on the motion to suppress adequate supplementary evidence known to the police at the time of the affidavit was presented sufficient to establish its authenticity as in *Draper, supra.* Furthermore, *Whitely v. Warden,* 401 U. S. 560, 28 L. Ed. 2d 306, 91 S. Ct. 1031 indicates that the facts may be supplied later to support the previously issued arrest warrant. Neither the United States Court of Appeals for the Eighth Circuit nor the United States District Court for the District of Nebraska would adopt this approach, holding to the view that sufficient information must be presented to the magistrate at the time the warrant issues. (See Appendix 1, p. 39 and Appendix 2, p. 68).

This court in *Coolidge v. New Hampshire,* 403 U. S. 443, 29 L. Ed. 2d 564, 91 S. Ct. 2022, discussed the conflict or disagreement over the importance of requiring law enforcement officers to secure warrants pointing out that some have argued that a determination by a magistrate of probable cause as a precondition of any search or seizure is so essential that the Fourth Amendment is violated whenever the police might reasonably have obtained a warrant but failed to do so. But, that others have argued with equal force that a test of reasonableness, applied after the fact of the search or seizure when the police attempt to introduce the fruits in evidence affords ample safeguards for the rights in question so that "the relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable."

In the present case two judges of the Supreme Court of Nebraska in a concurring opinion suggested that the affidavit for a search warrant should be validated by the evidence in possession of the police at the time of the search warrant but not included therein but which was later presented at the hearing for the motion to suppress. On February 6, 1975, the Supreme Court of Nebraska referred to this case *State v. Dussault,* 193 Neb. 122, — N. W. 2d — holding in a unanimous opinion as follows:

> "We discussed what we believe to be the import of Aguilar and Spinelli in State v. Rice, *supra,* and will not repeat it here. Moreover, we indicated in that case that the contents of the affidavit may, at a suppression hearing, be supplemented by other evidence known to the police and if in toto probable cause may be said to have existed at the time of the search, the motion to suppress shall be denied. We there cited Draper v. United States, *supra,* and Whiteley v. Warden, *supra,* as supporting the position we there took. We now expressly hold that at a hearing on a motion to suppress, the contents of the affidavit for arrest or search may be supplemented by additional information proved to have been known by the police at the time the affidavit was made and the warrant issued, but not set forth in the affidavit. See State v. Rice, *supra,* at p. 755, opinion of McCown, J., concurring in result. Such a principle we deem proper in view of the fact that the United States Supreme Court has not resolved the controversy as to whether the police must always get

a warrant when it is reasonably possible to do so, or whether a test of reasonableness applied after the fact of the search is sufficient to protect constitutional rights. * * * " (193 Neb. at 127).

This problem deserves the further attention of this court.

5. **After the Federal District Court Ruled the Search Warrant Was Invalid Should Not it Have Sent the Case Back to the State District Court for an Evidentiary Hearing on the Question of Entry and Search Without a Warrant for Exhaustion of That Issue?**

Since both the state trial court and the state Supreme Court found that the search warrant was valid it had no occasion to ever go into the facts or the law as to whether the entry and search would have been valid without the warrant. This was never even presented to the state district court. While it was briefed and argued to the state Supreme Court it cannot be assumed that the state Supreme Court seriously considered the question since it was unnecessary to its finding.

Of more importance, had the federal district court sent the case back to the state trial court in Douglas County, Nebraska, the Douglas County Attorney and his staff who tried the case originally and who with the police department were much more familiar with the case than the Attorney General's Office, could undoubtedly have developed the facts more thoroughly and convincingly than was done in the federal district court.

The stand of the United States Court of Appeals for the Eighth Circuit (Appendix 1, p. 46) here seems to be in

direct conflict with the stand of the same court in *Goham v. Wolff*, 471 F. 2d 52, where the Supreme Court of Nebraska had determined that the retrocession of federal jurisdiction over Indian lands was invalid but made no determination as to pending cases even though the matter was briefed and argued to the state Supreme Court. When the case reached the United States District Court for the District of Nebraska the district court found the retrocession to be valid and remanded the case to the state Supreme Court for exhaustion of the state remedy as to pending cases. The state Supreme Court refused to act upon the matter and upon appeal to the United States Court of Appeals, it affirmed the United States District Court that there had been no exhaustion. We see no distinction from the present case and, in fact, in the present case there is much more need for exhaustion than in the *Goham* case.

Respectfully submitted,

PAUL L. DOUGLAS,
Attorney General of Nebraska,

MELVIN KENT KAMMERLOHR,
Assistant Attorney General,

State of Nebraska,
2119 State Capitol
Lincoln, Nebraska 68509
Telephone: (402) 471-2211

Attorneys for Petitioner.

APPENDIX I

United States Court of Appeals
For the Eighth Circuit

No. 74-1682

David L. Rice,
Appellee,

v.

Charles L. Wolff, Jr., Warden,
Nebraska Penal and Correctional Complex,
Appellant.

Appeal from the United States District Court
for the District of Nebraska

Submitted: December 12, 1974

Filed: January 28, 1975

Before MATTHES, Senior Circuit Judge, BRIGHT and STEPHENSON, Circuit Judges.

MATTHES, Senior Circuit Judge.

The petitioner in this habeas corpus action, David L. Rice, was convicted in Nebraska state court of the first degree murder of an Omaha policeman, Larry D.

Minard, who was killed when a suitcase he was examining exploded. The conviction was affirmed. *State v. Rice*, 188 Neb. 728, 199 N. W. 2d 480 (1972). Petitioner sought habeas corpus relief from the United States District Court for the District of Nebraska, pursuant to 28 U.S.C. § 2254. Chief Judge Urbom, after due consideration, granted the writ.

This appeal by the State of Nebraska for respondent Wolff raises several important questions in the law of search and seizure. At issue is whether Judge Urbom erred in ruling that the search of petitioner's house by members of the Omaha police force was illegal, and that certain evidence seized during that search or as a fruit of the search should have been suppressed at petitioner's trial in state court.

We first review the basic facts precipitating the prosecution and the ensuing court proceedings.

At 2:05 a. m. on Monday, August 17, 1970, an Omaha police radio dispatcher received a telephone call from a 911 operator that someone had reported a woman screaming at 2865 Ohio Street, in Omaha. The dispatcher sent two police cars to that address, and officers in a third vehicle also arrived at the scene. One of the policemen responding was Larry Minard. The house at 2865 Ohio was vacant. As the police entered the structure, they were forced to step over a suitcase lying on its side in the doorway. Several minutes after the police first entered the house, Officer Minard approached the suitcase and apparently was inspecting it when it exploded, instantly killing him. Subsequent investigation established that the suitcase had contained dynamite, which had been wired in such a manner that any movement of the suitcase would detonate the dynamite.

A police task force immediately began an investigation of the bombing. By Saturday morning, August 22, 1970, the investigation began to focus upon one Duane

Peak, a fifteen-year-old member of the National Committee to Combat Fascism (NCCF), a political organization known in the community as the Black Panther Party. Specifically, several persons had identified Peak as the individual who had called to report a disturbance at the vacant house on Ohio Street. Moreover, several people had seen Peak some time prior to the murder of Officer Minard with a suitcase similar to the one used in the bombing. The police also had knowledge that Edward Poindexter, an officer in the NCCF, was capable of rigging a booby trap bomb.

The NCCF was well known to the Omaha police. For two years prior to the murder of Minard, the police had maintained an intelligence file on the NCCF and a predecessor organization, the United Front Against Fascism. The file included publications of the NCCF, some of which contained articles by Poindexter or petitioner advocating violence against the police and others.

On Saturday afternoon, August 22, warrants were issued for the arrest of Peak and Poindexter, and the Omaha police force began a city-wide search for the two suspects. Since the police had no specific information or tips as to the whereabouts of Peak or Poindexter, police officials listed the various places where it was believed the two might be located and instructed police teams to visit or search the various locations. Among the places searched or visited on Saturday afternoon and evening were the NCCF headquarters at 3508 North 24th Street, the residence of one of the suspects, and the homes of certain of their relatives and associates.

By Saturday evening Edward Poindexter had been apprehended. Peak, however, the prime suspect in the case, was still at large. The police believed that members of the NCCF were searching for Peak in order to eliminate him, since he supposedly could incriminate others in the NCCF as accomplices in the bombing. Consequently, the police search for Peak continued.

At 10:30 Saturday night policemen in search of Peak arrived at the home of David Rice, the petitioner, at 2816 Parker Street. Petitioner was known to the police as an officer in the NCCF. Based on testimony credited by Judge Urbom at an evidentiary hearing in the district court, it appears that the only reasons for placing petitioner's house on the list of places to be searched were that both petitioner and Peak were members of the NCCF and Peak had been in petitioner's house some weeks previously.

Lights and a television were on in the petitioner's home when the police arrived, but there was no response to the officers' knock at the door. The leaders of the police team, Sergeants Swanson and Pfeffer, decided not to forcibly enter the house immediately. Instead, they proceeded to the office of a Municipal Court Judge, made an affidavit, and obtained a search warrant while the other officers encircled petitioner's house and waited. Swanson and Pfeffer returned an hour or more later with the search warrant, and petitioner's house was finally entered by the police with the two-fold purpose of searching for and arresting Peak and searching for dynamite believed in the possession of the NCCF.

Peak was not in the house. But the police discovered, assertedly in plain view, fourteen sticks of dynamite, blasting caps, wiring, a battery, and a pair of long-nosed pliers.

Peak was subsequently arrested, and on August 27 petitioner voluntarily surrendered. The clothing petitioner was wearing at the time of his arrest was seized by the police and subjected to chemical analysis for dynamite particles.

Poindexter and petitioner subsequently were tried jointly for first degree murder. Both moved the state trial court to suppress various items seized by the police, including those seized during the search of petitioner's

house and the clothing seized from petitioner upon his arrest.[1] The state trial court denied the motion to suppress, ruling that the search was legal pursuant to a valid search warrant.

At the trial, Peak implicated Poindexter and petitioner in the bombing plot. As corroborative evidence, the State introduced many of the items seized at the petitioner's house during the search of August 22, and introduced the results of the chemical analysis of petitioner's clothing seized at the time of his arrest. The analysis indicated that dynamite granules were in the pockets of the trousers. Both defendants were convicted by a jury on April 17, 1971. Petitioner was sentenced to life imprisonment.

On appeal to the Supreme Court of Nebraska, the primary attack by Poindexter and petitioner was upon the trial court decision to deny the motion to suppress. Specifically, they contended that the trial court erred in upholding the validity of the search warrant. The State defended the ruling of the district court, but further argued that even if the search warrant was improper, entry into petitioner's house was reasonably and properly undertaken in search of Duane Peak, and the evidence discovered in plain view during this search pursuant to a valid arrest warrant was admissible at trial. The two defendants attacked this alternative ground of search to arrest in their reply brief.

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1. Petitioner contended in both the state courts and in the federal district court that the search of his clothing was based solely upon information obtained from the alleged illegal search of his house, and that the results of the chemical analysis of the clothing were therefore fruit of the poisonous tree. See Wong Sun v. United States, 371 U. S. 471 (1963). The district court so held, and the State has not attacked that ruling on appeal.

The state supreme court affirmed the convictions of both men on July 18, 1972, ruling that the search of petitioner's home was pursuant to a valid search warrant. The court did not consider whether entry into petitioner's home could be justified as one in search of Peak. *See State v. Rice, supra.*

On September 29, 1972, petitioner filed this petition for writ of habeas corpus in the federal district court in Nebraska. Petitioner urged that his sentence was unlawful because the underlying conviction was based upon evidence seized in violation of the fourth and fourteenth amendments to the United States Constitution.

Judge Urbom filed a memorandum on March 30, 1974, — F. Supp. — (D. Neb. 1974), ruling that the affidavit for the search warrant was fatally defective and that consequently the search warrant was invalid. The district court ordered a hearing on the alternative ground asserted by the State as legally justifying the entry and search of the residence. An evidentiary hearing was held, and on July 5, 1974, Chief Judge Urbom filed an opinion, — F. Supp. — (D. Neb. 1974), finding that the police did not have probable or reasonable cause to enter the petitioner's house in search of Peak, and that the search was therefore wholly unlawful. Habeas corpus relief was granted: petitioner was ordered released from custody unless he was granted a new trial within 90 days of the district court decision or within 90 days of an appellate court decision affirming the district court order, whichever was later. This appeal by the State of Nebraska for respondent Wolff followed.

I.

We turn first to the ruling of the district court that the warrant to search the petitioner's house was invalid. It is fundamental constitutional law, of course, that a search warrant may issue only upon a showing that there is probable cause to believe that the item sought is lo-

cated on the premises for which the search warrant is requested. *United States v. United States District Court,* 407 U. S. 297, 316-317 (1972); *Aguilar v. Texas,* 378 U. S. 108, 112 (1964); *Nathanson v. United States,* 290 U. S. 41, 47 (1933). The district court found that the warrant in the instant case was invalid because the affidavit submitted by the two police sergeants to the magistrate was insufficient to establish probable cause.[2] *Spinelli v. United States,* 393 U. S. 410 (1969); *Aguilar v. Texas, supra.*

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2. The affidavit submitted to the magistrate was as follows:

The complaint and affidavit of Sgt. R. Pfeffer and Sgt. Jack Swanson, on this 22 day of August, 1970, who, being first duly sworn, upon oath says:

That he has just and reasonable grounds to believe, and does believe that there is concealed or kept as hereinafter described, the following property, to-wit: Dynamite and devices which could be used to construct devices which could cause injury to persons and damage to property. Also illegal weapons which he stated should be used against Police Officers.

That said property is concealed or kept in, on, or about the following described place or person, to-wit: A one story white frame house on Parker Street at 2816, In Omaha Douglas County, Nebraska.

That said property is under the control or custody of David Lewis RICE, Minister of Information, National Comittee [sic] to Combat Fascism.

That the following are the grounds for issuance of a search warrant for said property and the reasons for his belief, to-wit: David Rice is a known member of the National Comitte [sic] to Combat Fascism, which advocates the violent killing of Police Officers. A violent killing of a Police Officer occured [sic], in Omaha, and arrests were made from the membership of the NCCF. We have been told in

(Continued on next page)

The state trial court on the motion to suppress and the state supreme court on appeal had ruled that the search warrant was supported by probable cause and therefore valid. In considering that probable cause had been shown, the state courts did not limit themselves to an examination of the affidavit before the magistrate. Rather, the state courts relied, in part at least, upon testimony adduced at the suppression hearing. Evidence at that hearing arguably showed that the police had probable cause to search petitioner's home, although the circumstances permitting the police to reach such a conclusion were for the most part not revealed to the magistrate at the time the search warrant was issued.

A.

The State contends that the federal district court should not have limited itself to an examination of only the affidavit of Pfeffer and Swanson in determining if the search warrant was supported by an adequate showing of probable cause. But the refusal of Judge Urbom to consider any facts or circumstances not revealed to the magistrate is amply supported by the opinions of the United States Supreme Court. *Spinelli v. United States,*

(Continued from previous page)

the past that RICE keeps explosives, at his residence, and also illegal weapons, which he has said should be used against Police Officers.

A warrant authorizing a night-time search is requested because Nighttime when information was secured, and the property may be removed.

Apparently, the only evidence of probable cause submitted to the magistrate was the officers' affidavit. The State does not contend that the affidavit was supplemented by any oral testimony of the officers before the magistrate.

supra, 393 U. S. at 413 n. 3; *Aguilar v. Texas, supra*, 378 U. S. at 109 n. 1. *See also Whitely v. Warden*, 401 U. S. 560, 565 n. 8 (1971).

By urging that the district court should have allowed the State at a suppression hearing subsequent to the search to rehabilitate the assertedly inadequate affidavit for the search warrant, the State is in effect suggesting that even in the absence of exigent circumstances the police should be permitted to conduct searches on their own assessment of probable cause, subject to the post hoc ratification of that assessment by the judiciary.[3] *Cf. United States v. Chavez*, 482 F. 2d 1268, 1270 (5th Cir. 1973). Such a procedure would be contrary to the previous teachings of the Supreme Court as to the policies to be furthered by the warrant requirement of the fourth amendment, and in no way would protect innocent citizens from unreasonable searches by police officers who had erred in assessing the existence of probable cause to search a particular premises. As Mr. Justice Jackson observed in *Johnson v. United States*, 333 U. S. 10, 13-14 (1948):

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a

3. Since we are here considering the search warrant in fact obtained by the police, we need not consider at this time those cases permitting law enforcement officials to act upon their own assessment of probable cause if exigent circumstances preclude the opportunity to seek a timely search warrant.

> search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. . . . When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent.

Also, *see Chimel v. California*, 395 U. S. 752, 760-762 (1969).

Nevertheless, the State cites two Supreme Court opinions, *Draper v. United States*, 358 U. S. 307 (1959), and *Whitely v. Warden*, 401 U. S. 560 (1971), for the proposition that a showing before the magistrate of probable cause to search can be supplemented by information or circumstances known to the police officers but not disclosed to the magistrate issuing the warrant. The two decisions, however, do not stand for this principle.

There was no warrant of any kind involved in *Draper*. Rather, law officers arrested a heroin trafficker on a tip that he would be carrying heroin. Essential to an understanding of the *Draper* case is the realization that in certain instances a law enforcement officer may arrest without an arrest warrant if he, rather than a magistrate, has probable cause to believe that a crime is being committed. The Supreme Court in *Draper* held that a valid warrantless arrest of a suspect had been made because a post-arrest hearing showed that so much of the informer's tip had been verified by police observation that it was reasonable for the police to conclude that the informant's information that the suspect was carrying heroin was reliable, thereby establishing probable cause for arrest. Although *Draper* is valuable for providing a test on how much of the detail of an unsubstantiated informer's tip must be verified by police before the tip can be considered reliable grounds supporting a

finding of probable cause, *see Spinelli v. United States, supra,* 393 U. S. at 416-417; *United States v. Marihart,* 472 F. 2d 809, 812-814 (8th Cir. 1972), *Draper* does not render support to the proposition that a probable cause affidavit for a search warrant can be rehabilitated after the fact.

In *Whitely,* a Wyoming sheriff had obtained an arrest warrant from a magistrate, but upon an affidavit which did not adequately show that there was probable cause to arrest the suspects named. The Supreme Court specifically held, 401 U. S. at 565 n. 8, that the affidavit could not be rehabilitated in a post-arrest hearing by information known to the sheriff but not disclosed to the magistrate. The Court further held that the arresting officers did not have probable cause to make a warrantless arrest.

Neither case undermines the principles that a search warrant is valid only if probable cause has been shown to the magistrate and that an inadequate showing may not be rescued by post-search testimony on information known to the searching officers at the time of the search.

The State points out that the police officers in this case at least attempted to obtain a search warrant, and contends that the district court's refusal to judge probable cause on anything other than information revealed to the magistrate "penalizes" those officers who attempted to comply with the warrant requirement and "rewards" those who do not. Such an argument misapprehends the requirements and policies of the fourth amendment. For the reasons outlined above in the statement by Mr. Justice Jackson, the fourth amendment mandates that except in limited instances the police must submit the question of whether there is probable cause to search to the judgment of a neutral and detached magistrate. *Coolidge v. New Hampshire,* 403 U. S. 443 (1971); *Chambers v. Maroney,* 399 U. S. 42 (1970); *United States v. Bozada,* 473 F. 2d 389, 390-391 (8th Cir.),

cert. denied, 411 U. S. 969 (1973). "Only in exigent circumstances will the judgment of the police as to probable cause serve as sufficient authorization for a search." *Chambers v. Maroney, supra,* 399 U. S. at 51. Thus the requirement that probable cause be shown to the magistrate is not intended as "punishment," but rather is intended to protect basic fourth amendment rights of citizens. Likewise, a law enforcement officer who fails to seek a search warrant is not being "rewarded": unless he can point to exigent circumstances precluding the opportunity to apply for a warrant, he is required to have the presence of probable cause to search determined by a magistrate, and the failure to do so for the sole purpose of avoiding a review of probable cause will result in the search being held illegal.

Therefore, we hold that the district court did not err in reviewing the sufficiency of the showing of probable cause to issue the search warrant solely in light of the affidavit of probable cause submitted to the Municipal Court judge acting as magistrate.

B.

We now consider the ruling of the district court that the affidavit, viewed alone, did not make an adequate showing of probable cause to justify issuance of the search warrant. A study of the affidavit reveals that the officers' averment of probable cause to search was primarily based upon an informant's tip. Specifically, the only averment in the affidavit of criminal activity or of evidence of criminal activity in petitioner's house was the statement:

> We have been told in the past that RICE keeps explosives, at his residence, and also illegal weapons, which he has said should be used against Police Officers.

In *Aguilar v. Texas,* 378 U. S. 108 (1964), the Supreme Court specified what information is necessary to show probable cause in an affidavit relying upon an informant's tip. First, there must be evidence allowing the magistrate to conclude that the informant is himself trustworthy. Second, there must be a sufficient showing of the underlying circumstances on which the informant based his information to enable the magistrate to determine that the informant's tip is reliable and not based on mere rumor. In *Spinelli v. United States,* 393 U. S. 410 (1969), the Supreme Court further refined *Aguilar* by holding that an affidavit deficient under the *Aguilar* test is nevertheless sufficient if averments in the affidavit, aside from the tip, so corroborate the tip that it is "as reliable as one which passes *Aguilar's* requirements when standing alone." 393 U. S. at 416. *See United States v. Cummings,* — F. 2d — (8th Cir. 1974); *United States v. Marihart, supra,* 472 F. 2d at 813.

It is apparent that the affidavit filed by Sergeants Pfeffer and Swanson in this case does not meet either criterion of the *Aguilar-Spinelli* test[4] The affidavit contains no averments from which the magistrate could conclude that the informant was reliable and trustworthy. Nor could the magistrate determine from the affidavit that the informant's tip was based upon more than mere rumor and speculation. The averments of the affidavit that petitioner was a member of the NCCF and that NCCF members had already been arrested in the case possibly enhanced the suspicion that petitioner in some way was involved with the bombing plot, but these allegations do not serve to independently corroborate the tip that weapons and explosives were in the petitioner's house.

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4. Indeed, the state trial court found that the affidavit, if not rehabilitated by evidence not disclosed to the magistrate, failed to comply with the requirements of Aguilar and Spinelli.

The Supreme Court stated in *Spinelli v. United States, supra,* 393 U. S. at 416:

> In the absence of a statement detailing the manner in which the information was gathered, it is especially important that the tip describe the accused's criminal activity in sufficient detail that the magistrate may know that he is relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation.

The principal shortcoming in the affidavit presently under review is that the only corroboration of the informant's tip is the petitioner's reputation as a member of the NCCF, precisely the type of vague and nebulous corroboration condemned in the above passage from the *Spinelli* opinion.

The State, however, directs our attention to *United States v. Harris,* 403 U. S. 573 (1971), in which a plurality of the Supreme Court indicated that it was willing to relax the standards for judging the reliability of informants' tips. The State suggests that this court should do likewise. But *Aguilar* and *Spinelli* have not been overruled, and this court previously has stated subsequent to *Harris* that it will continue to apply the standards of *Aguilar* and *Spinelli* in the absence of a more definitive ruling by the Supreme Court. *United States v. Marihart, supra,* 472 F. 2d at 813 n. 5; *LeDent v. Wolff,* 460 F. 2d 1001, 1003 (8th Cir. 1972).[5]

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5. Even if the Harris reasoning were applied to the present affidavit, it is apparent that the affidavit would still be deficient. In Harris, the affidavit at least met one half of the Aguilar test, since it averred that the informant's tip was derived from per-

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The decisions of the Supreme Court convincingly demonstrate, and we so hold, that the district court was left with no choice but to conclude that the affidavit of Sergeants Pfeffer and Swanson was insufficient to establish probably cause. Consequently, the district court was correct in holding that the search warrant was invalid.

II.

The State urges that even if the federal district court was correct in ruling that the search warrant was invalid, the court erred in holding that the police officers could not legally enter the petitioner's house in search of Duane Peak, for whom the police had a valid arrest warrant. If the police could legally enter the house in search of

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sonal observation and therefore was based upon reliable information.

The significance of the **Harris** opinion is that it upheld the affidavit even though the trustworthiness of the informant was not shown. But the **Harris** affidavit contained additional indicia that the informant was reliable: the informant was making an admission against penal interest; the tip was highly detailed, further suggesting personal observation; and the conduct attributed by the informant to the property owner was consistent with the owner's criminal reputation. The affidavit in our case contains no such corroboration suggesting the informant's trustworthiness or the reliability of his information. Petitioner's reputation as a member of the NCCF is insufficient in itself to substantiate a tip that his house contained explosives. **See generally 85 Harv. L. Rev. 3, 53 (1971).**

Peak, then it is likely that the seizure of the dynamite and related paraphernalia was proper, since it appears from the record that the incriminating evidence probably was in plain view inside the house.

A.

As a preliminary matter, the State contends that the federal district court should not have considered the question whether the police could legally enter petitioner's home in search of Peak. Instead, the State argues, Judge Urbom should have dismissed the petition on the ground that the petitioner had not exhausted his state remedies for relief on this alternative ground, since no Nebraska state court has ever ruled on the specific question of whether the police could enter petitioner's house in search of Peak. The State thus submits that the state courts should be allow to rule on this question before a federal district court construes it. Judge Urbom rejected this suggestion. We find that he was correct in doing so.

It is, of course, settled law that federal habeas corpus will not be granted to a state prisoner unless he has exhausted all available state remedies. 28 U. S. C. §§2254 (b) & (c). This doctrine of exhaustion of state remedies is a rule designed to harmonize the relationship between the federal judiciary and the state court systems, for "it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation." *Darr v. Burford,* 339 U.S. 200, 204 (1950).

But there are limits to the scope of the exhaustion doctrine, and the exhaustion standard is not an inflexible requirement: it is a rule of comity and not a rule limiting the power of the federal courts to give habeas relief. *Smith v. Wolff,* — F. 2d — (8th Cir. 1974). Thus the Supreme Court has held that the exhaustion provisions of § 2254 refer only to those remedies still open to the habeas petitioner at the time he files his petition in the

federal district court. *Humphrey v. Cady,* 405 U. S. 504, 516 (1972); *Fay v. Noia,* 372 U. S. 391, 434-435 (1963). Similarly, it is not necessary that the state courts must have ruled on the merits of an issue before the question can be considered by the federal judiciary in a habeas action. *United States ex rel. Meadows v. State,* 426 F. 2d 1176 (2d Cir. 1970), *cert. denied,* 401 U. S. 941 (1971); *Loiseau v. Sigler,* 421 F. 2d 825 (8th Cir. 1970). It is enough that the state courts have been presented the opportunity to rule on the questions raised by the petitioner in his federal petition. *Picard v. Conner,* 404 U. S. 270 (1971).

There is no question that the petitioner in this case presented to both the state trial court and the state supreme court his claim that the search of his house was illegal. Specifically, he asserted that the search warrant on which the search was based was deficient. Obviously, petitioner was not required to anticipate all the possible defenses the State might assert to his claim that the search of his house was illegal. In fact, the State did not pose the alternative ground of a search to arrest Peak at the suppression hearing, but rather first asserted that possible justification for the search during petitioner's appeal to the Supreme Court of Nebraska.[6] Nevertheless, the Supreme Court of Nebraska declined the opportunity to consider this alternative ground, and declined also to order further factfinding on the matter. Instead, the court ruled that the search warrant was valid.

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6. Indeed, the State used one-third of its 54-page brief in the state supreme court to recite parts of the voluminous trial record from which the State believed the court could rule that entry into petitioner's house was legal as a search for Peak, even if the search warrant was defective.

Moreover, it is clear that on the facts of this case petitioner had no effective remedy still available in the state courts when he filed his federal habeas petition. The state supreme court had already ruled on direct appeal that the search warrant was valid. Any attempt by petitioner to seek post-conviction relief in the state courts surely would have been rejected on the ground that, regardless of whether the police legally could have entered petitioner's house to search for Peak, the state supreme court had rendered consideration of the issue unnecessary by holding that the search warrant was valid. Clerly, any attempt by petitioner to further attack the search of his house as illegal in any state post-conviction proceeding would have been an exercise in futility. *See Wilwording v. Swenson,* 404 U. S. 249 (1971); *United States ex rel. Condon v. Erickson,* 459 F. 2d 663 (8th Cir. 1972). *Cf. Evans v. Cunningham,* 335 F. 2d 491 (4th Cir. 1964). The intervening circumstance of the search warrant being held invalid, thereby creating the possibility of a new avenue for relief in the state courts, occurred only after the filing of petitioner's federal habeas petition — as a direct consequence of that filing.

We consider *Roberts v. LaVallee,* 389 U. S. 40 (1967), to be analogous authority for the propostion that the petitioner need not seek further relief in the state courts before applying for federal relief. In *Roberts,* a New York criminal defendant sought from the state trial court a free transcript of a prior preliminary hearing. The request was denied and the defendant was eventually convicted. On the subsequent appeal the propriety of the denial of the free transcript was raised, but the defendant's conviction was affirmed. The defendant then sought federal habeas relief. After his federal petition was denied by the district court, a state appellate court decision in an unrelated case ruled that the denial of a free transcript of a preliminary hearing was a denial of equal protection under both the federal and state constitutions. The Court of Appeals for the Second Circuit declined to rule on the defendant's appeal from the denial

of federal habeas relief because the "constitutional necessity for federal court intervention" was "open to doubt'" in light of the recent state appellate court decision and the likelihood of relief in the state court if the defendant filed a state post-conviction motion. The United States Supreme Court reversed, noting that Congress in enacting the exhaustion requirement of 28 U.S.C. § 2254 had "not intended to require repetitious applications to the state courts."

We believe that the *Roberts* opinion supports our holding that petitioner has exhausted his state remedies and need not return to the state courts to further litigate the legality of this alternative ground arguably justifying the search, a ground which was raised before the state supreme court but which the court declined to consider or inquire into.

Our holding in *Goham v. Wolff*, 471 F. 2d 52 (8th Cir. 1972), *cert. denied sub nom. Tyndall v. Wolff*, 414 U. S. 834 (1973), is not to the contrary. In *Goham*, unlike in *Roberts* and the present case, the intervening circumstances creating the renewed possibility of obtaining relief in the state courts occurred before the prisoner filed his petition for federal habeas corpus relief. Thus the petitioner in *Goham* could have sought relief just as easily and effectively in the state courts as in the federal judiciary. In our case, however, the petitioner had no effective state remedy available when he filed his federal petition. Moreover, to send the petitioner back to the state courts, over two years after the filing of his federal habeas motion, to assert a question which the state supreme court previously had before it, is manifestly unreasonable, and we do not believe that the law requires such a result. In any event, the holding in *Goham* probably has been weakened by a subsequent decision of the United States Supreme Court reaffirming the teachings of *Roberts v. LaVallee. Francisco v. Gathright*, — U.S. — (1974). As we noted in *Loiseau v. Sigler, supra*, 421 F. 2d at 828:

> The doctrine of exhaustion of state remedies is only a rule of comity and need not be mechanically applied where the state court, for procedural reasons, has once refused to pass upon the merits of the question. In any event, once jurisdiction is asserted and the federal district court has conducted a full evidentiary hearing, it would be a waste of judicial machinery to require a second evidentiary hearing by another court which exerts only concurrent jurisdiction.

We hold that the petitioner has exhausted his state remedies, and that the district court did not err in considering petitioner's claim that the entry by police into his home to search for Duane Peak was illegal. *See, e.g., Roberts v. LaVallee, supra; Francisco v. Gathright supra; Loiseau v. Sigler, supra; Smith v. Peyton,* 413 F. 2d 760 (4th Cir. 1969); *Hawkins v. Robinson,* 367 F. Supp. 1025 (D. Conn. 1973). *Cf. United States ex rel. Condon v. Erickson,* 459 F. 2d 663 (8th Cir. 1972).

B.

Finally, we reach the argument to which the State devotes most of its brief in this court: even if the search warrant for the petitioner's house was invalid, police officers legally could enter the house in search of Peak in order to arrest him.

Police entry into a private dwelling without a search warrant in search of a suspect for whom an arrest warrant has been issued carries precisely the same fourth amendment implications as entry into a dwelling to make a warrantless search for tangible property. Citizens are entitled to the same constitutional protection from unreasonable searches and seizures when the police are seeking a suspect for arrest as when they are seeking some contraband for evidence. Thus, "arrest warrants are not substitutes for search, warrants." *Government of the Virgin Islands v. Gereau,* 502 F. 2d 914, 928 (3rd Cir. 1974).

Consequently, we hold, as have several other courts of appeals, that the fourth amendment mandates, as a minimum, that police officers may not enter the dwelling or premises of a third person in search of a suspect for whom they have a valid arrest warrant unless they have reasonable or probable cause to believe that the suspect is within.[7] *Government of the Virgin Islands v. Gereau, supra; United States v. Phillips,* 497 F. 2d 1131 (9th Cir. 1974); *Fisher v. Volz,* 496 F. 2d 333 (3rd Cir. 1974); *United States v. Brown,* 467 F. 2d 419 (D. C. Cir. 1972); *United States v. McKinney,* 379 F. 2d 259 (6th Cir. 1967). *Cf. Lankford v. Gelston,* 364 F. 2d 197 (4th Cir. 1966). *See also United States v. Shye,* 492 F. 2d 886 (6th Cir. 1974) (opinion of district court as appendix); *United States v. Watson,* 307 F. Supp. 173 (D. D. C. 1969). To hold otherwise would carve out an exception to the constitutional requirement that citizens are to be secure from unreasonable searches and seizures, for the Supreme Court noted in *Chambers v. Maroney, supra,* 399 U.S. at 51:

> In enforcing the Fourth Amendment's prohibition against unreasonable searches and seizures, the Court has insisted upon probable cause as a minimum requirement for a reasonable search permitted by the Constitution.

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7. Given the factual setting of the cases before us, we need not consider whether the police officers should have obtained a valid search warrant before entering petitioner's home in search of Peak. It is not yet settled whether the Constitution requires not only that the policeman have probable cause to believe that the suspect sought for arrest is within the premises but also that, absent exigent circumstances, he obtain a search warrant. **Compare United States v. McKinney,** 379 F. 2d 259, 262-263 (6th Cir. 1967), **with United States v. Shye,** 492 F. 2d 886, 891 (6th Cir. 1974). **See generally** Amsterdam, **Perspectives on the Fourth Amendment,** 58 **Minn. L. Rev.** 349, 360 (1974); Note, **The Neglected Fourth Amendment Problem in Arrest Entries,** 23 **Stanford L. Rev.** 995 (1971).

The State insists that the police officers did indeed have probable cause to believe that Peak was inside when they entered petitioner's house on August 22. After an evidentiary hearing on this question, Judge Urbom found that the police did not have such probable cause. We agree.

In an effort to show that the police had probable cause to believe that Peak was in the house, the State refers to numerous places in the substantial record where it was shown that the police knew at the time of the search that Peak, Poindexter, and petitioner were members of the NCCF; that petitioner and Poindexter could fabricate a bomb; and that Peak probably had a role in the bombing. But none of this evidence, or at least none credited by Judge Urbom, shows that the police had a firm, concrete, and otherwise reasonable belief that Peak was at the petitioner's house when they entered it. It is one thing to know that Peak is a member of the NCCF suspected of helping lure a policeman to his death and quite another to know that Peak is at the petitioner's house or even that petitioner may have explosives stored in his home.[8]

In fact, the tesitmony of the various police officers at the evidentiary hearing held before the district court strongly suggests that the police had no evidence whatever that Peak was at petitioner's house and that they were acting on nothing more than a hunch or random guess. The statements of Sergeants Pfeffer and Swanson, the leaders of the search, as well as one of their superiors, Lieutenant Perry, show that the Omaha police had made a list of the locations where Peak might be found,

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8. Indeed, at the time of the search of petitioner's home, the police apparently had no evidence or tips specifically tying petitioner to the bombing plot.

based on his prior habits and associations. The petitioner's house, as well as the homes of other friends and relatives of Peak and Poindexter, were to be searched in accordance with this list. Thus, for example, Sgt. Swanson testified:

> Q. Did you have any report from ayone that Duane Peak was then side the Rice house or had been inside the Rice house that day?
>
> A. No, sir. The only thing we had was a speculation because it was a known house of that particular group and he was a member of that group and it was a place where he might possibly be.

Clearly, such speculation is not a reasonable ground justifying the invasion of citizens' privacy.

The State, however, points to certain testimony given by Lt. Perry at the federal district court hearing which suggests that he had been told by relatives of Duane Peak that Peak was a constant companion of petitioner and Poindexter and that the bomb which killed officer Minard was made at petitioner's house. The State urges that the district court should have found that the police had probable cause to enter petitioner's house based on this testimony. But Judge Urbom discredited this testimony after finding that it was uncorroborated and indeed contradicted by the rest of the record. ——F. Supp. at ——. We have stated before in reviewing factual determinations of a district court hearing a habeas petition that this court "will not retry issues of fact or substitute its judgment with respect to such issues for the judgment of trial court." *Schultz v. State of Nebraska,* 353 F. 2d 81 (8th Cir. 1965). "It was the province of the District Court to make credibility determinations." *Stidham v. Wingo,* 482 F. 2d 817, 820 (6th Cir. 1973); *King v. Beto,* 429 F. 2d 221 (5th Cir. 1970), *cert. denied,* 401 U. S. 936 (1971). After reviewing the record, we find that Judge Urbom's decision to discredit this particular testimony

was amply supported by the record and was not clearly erroneous.[9]

The State cites the Supreme Court opinion in *Warden v. Hayden,* 387 U. S. 294 (1967), and urges that police entry into a dwelling in search of a suspect, without probable cause to believe that he is within, may be constitutionally reasonable if certain exigent circumstances exist. But in *Hayden* the police in fact had probable cause to believe that the suspect was within the dwelling searched, and the *Hayden* opinion does not suggest that exigent circumstances may eliminate the need for police to have probable cause to believe the suspect is inside the premises to be searched.[10]

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9. We are constrained to observe that even if the district court had credited the particular testimony of Lt. Perry in question, it is still doubtful that the police had probable cause to enter the house in search of Peak. **Cf. United States v. Shye, supra,** 492 F. 2d at 890 n. 4.

10. In **Hayden,** an armed robber was pursued by two taxi drivers who saw him enter a certain house. Within minutes the police arrived and entered the house pointed out to them by the two drivers. 387 U. S. at 297. The police cearly had every reason to believe the robbery suspect was still inside the house.

Dorman v. United States, 435 F. 2d 385 (D. C. Cir. 1970), and **Salvador v. United States,** — F. 2d — (8th Cir. 1974), are both distinguishable. In each case the court upheld the entry of a dwelling by law officers without a search warrant seeking a suspect under exigent circumstances, but each court explicitly found that the officers had probable cause to believe that the suspect was within. Nevertheless, there is language in **Dorman** intimating that, despite the absence of probable cause, entry into a dwelling in search of a suspect may be justified in certain instances by exigent circumstances. To the extent **that Dorman so holds, we respectfully disagreed.** Moreover, the very court which

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As we noted above by our reference to the Supreme Court opinion in *Chambers v. Maroney*, the minimum requirement for a reasonable search permitted by the Constitution is the existence of probable cause. *Hayden* and numerous other similar fourth amendment opinions of the Supreme Court stand for the principle that the additional constitutional requirement that the existence of this required probable cause be determined initially by a magistrate upon application for a search warrant need not be observed if certain exigent circumstances prevail which prevent the law officers from timely obtaining a search warrant. *See Fisher v. Volz, supra; United States v. Rubin*, 474 F. 2d 262, 268 (3rd Cir. 1973). *See also Camara v. Municipal Court*, 387 U. S. 523, 534-535 (1967).

The State, however, points to several state appellate court decisions relating to searches for explosives and bombs, and urges that in an exigent situation when the police are searching for a bombing suspect or bomb components, the degree of probable cause required to render a search reasonable is lessened or eliminated.[11] *See, e. g.,*

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rendered the Dorman opinion has ruled without qualification subsequent to Dorman that police must have probable cause before entering the dwelling of a third party in search of a suspect. United States v. Brown, 467 S. 2d 419 (D. C. Cir. 1972). As we noted above, other courts of appeals have held likewise. See, e. g., Fisher v. Volz, supra; United States v. Phillips, supra.

11. In Camara v. Municipal Court, 387 U. S. 523 (1967), and See v. City of Seattle, 387 U. S. 541 (1967), the Supreme Court recognized that probable cause is the constitutional measure of the reasonableness of a search, but modified the degree of probable cause required to make an administrative search reasonable by focusing on the governmental interest sought to be furthered

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People Superior Court, 6 Cal. App. 3d 379, 85 Cal. Rptr. 803 (1970). We note, however, that none of the cases cited holds that the probable cause requirement of the fourth amendment may be obviated by the exigencies of searching for a bombing suspect or explosives. Moreover, in light of what we have said above, we have serious doubts that the State's argument is in harmony with the provisions of the Constitution. *See, e. g.*, notes 10 and 11, *supra*. But in any event we need not consider this contention of the State, for we find that the district court did not err in ruling that on the record of this case the State has not shown exigent circumstances which could justify this search, even under the State's own theory on the law of probable cause.

The argument by the State that the Omaha police did not have to meet as stringent a probable cause standard in searching for Peak or the explosives in petitioner's house is primarily based upon two asserted exigent circumstances: (1) that the police officers feared that explosives possibly stored in the house might explode; and (2) that the officers believed that other NCCF members might be in the process of eliminating Peak inside the house.

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by that type of search: for example, a non-hostile search by health or fire officials to preserve the health and safety of all residents. There is nothing in either opinion to suggest that the degree of probable cause which must be shown to execute a criminal search ought to be modified in exigent circumstances. See generally Note, The Law of Administrative Inspections: Are Camara and See Still Alive and Well?, 1972 Wash. U. L. Q. 313.

Significant for the purposes of the appeal before us is the following language from Camara, supra, 387 U. S. at 534-535.

> In cases in which the Fourth Amendment requires that a warrant to search be obtained, "probable cause" is the

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The conduct of the police upon arrival at petitioner's home, however, erodes the exigent circumstances argument. After receiving no response to their knock on the door, the officers decided to obtain a search warrant. After a delay of more than an hour the police finally entered the house, eventually discovering the dynamite and other items admitted at trial.

The delay of more than an hour before entering the dwelling impairs the State's contention that the police were constrained by a sense of urgency to act swiftly, without regard to the mandates of the fourth amendment. Nor, apparently, did the police make any attempt to protect neighboring residents in the area from any asserted danger of explosion. Moreover, testimony before Judge Urbom suggests that the purpose of searching for explosives was an after-thought conceived after the police arrived at the house, rather than an urgent emergency, and that they decided to apply for a warrant to search for explosives in the petitioner's house only because they had not discovered dynamite in any of the other locations they had searched earlier in the day.

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standard by which a particular decision to search is tested against the constitutional mandate of reasonableness. To apply this standard, it is obviously necessary first to focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interest of the private citizen. For example, in a criminal investigation, the police may undertake to recover specific stolen or contraband goods. But that public interest would hardly justify a sweeping search of an entire city conducted in the hope that the goods might be found. Consequently, a search for these goods, even with a warrant, is "reasonable" only when there is "probable cause" to believe that they will be uncovered in a particular dwelling.

As for the apprehension that Peak was being killed, the delay of more than an hour before entering the house greatly attenuates the force of this argument.

We find that Judge Urbom did not err in ruling that there existed no exigent circumstances justifying the police search of petitioner's home without probable cause.

III.

We have read the brief of the amici to this court. The International Association of Chiefs of Police and Americans for Effective Law Enforcement, and we note their suggestion that we evaluate the application of the exclusionary rule in this case in light of the Supreme Court opinion in *Michigan v. Tucker,* 417 U. S. — (1974). But the Court in *Tucker* did not overturn the exclusionary rule, and it is still the law of the land. We are obliged to apply that law. In *Tucker,* Mr. Justice Rehnquist, writing for the Court, observed:

> The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in wilful, or at the very least, negligent conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instil in the particular investigating officers, or in their future counterparts, a greater degree of care toward the right of an accused.

417 U. S. at ——.

We consider it necessary to point out that the record discloses a widespread search for the suspects Peak and Poindexter which evinced at least a negligent disregard by the Omaha police for the constitutional rights of not only petitioner but possibly other citizens as well.[12]

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12. In dictum in **United States v. Cecil,** 457 F. 2d 1178, 1180 (8th Cir. 1972), we disapproved of the manner in which the search of the NCCF headquarters was conducted by law enforcement officers earlier on Saturday, August 22, 1970.

Such a police search is at least reminscent of the police conduct condemned in *Lankford v. Gelston, supra.* We believe that this is an appropriate case for the application of the exclusionary rule.

In summary, we hold that the existence of probable cause to support a search warrant may be judged only on the information submitted to the magistrate issuing the warrant, and we further hold that the evidence of probable cause submitted to the magistrate in this case was wholly insufficient, thereby rendering the search warrant under review invalid. Furthermore, finding that the petitioner has exhausted his state post-conviction remedies, we hold that the warrantless police entry into petitioner's house in search of Duane Peak or any explosives was without probable cause and in violation of the United States Constitution.

In concluding this lengthy opinion, we are mindful that a brutal crime was perpetrated in which the life of a police officer was ended without justification. It cannot be gainsaid that Judge Urbom recognized the seriousness of the offense and the general public outrage over the crime. Against this background, Judge Urbom exercised painstaking care in resolving the factual and constitutional issues in this case. Having done so, Judge Urbom conscientiously and courageously concluded and demonstrated in two soundly reasoned opinions that the petitioner had been deprived of a basic constitutional right.

We suspect that our affirmance of the grant of the writ will be regarded by some as an example of permissiveness and lack of concern for society by the judiciary. But no matter how heinous the crime, the fact of its commission alone is insufficient under our system of jurisprudence to establish the guilt of the accused. The safeguarding of fundamental constitutional rights is a tolerable price to pay for cherished standards of justice.

As Judge Urbom noted in his opinion, — F. Supp. —:

> No one can doubt the important public interest involved in apprehending an accused murdered of a police officer, but I think respondent seriously mischaracterizes the interest involved in preventing invasions of privacy by the police. The privacy of one's home and the concommitant ability to decide whom it shall shelter and when is one of the most precious rights we possess as citizens. Entry into the home by police absent probable cause to so enter is precisely what the Fourth Amendment forbids. Apprehension of a dangerous criminal outweighs this interest in the privacy of one's home only if there is probable cause to believe that the criminal is in the home.

The judgment of the district court is affirmed. Unless the State of Nebraska retries petitioner within a reasonable time, to be fixed by the district court, after the filing of our mandate in that court, the writ shall issue.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eights Circuit.

APPENDIX II

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

David L. Rice,

Petitioner,

v.

Charles L. Wolff, Jr., Warden, of the
Nebraska Penal and Correctional Complex,

Respondent.

MEMORANDUM

(Filed March 30, 1974)
CV72-L-303

APPEARANCES: For petitioner, David L. Herzog and Patrick Green
For respondent, Melvin Kammerlohr, Assistant Attorney General

URBOM, Chief Judge

David L. Rice has filed a petition for writ of habeas corpus in which he seeks release from the Nebraska Penal and Correctional Complex on the ground that his incarceration is in violation of the Constitution of the United States. The petitioner has been incarcerated at the Penal

Complex since his conviction by a jury in the District Court of Douglas County, Nebraska, of the crime of first degree murder in the bombing death of Omaha police officer Larry D. Minard, Sr. The case has been submitted to this court on the state court record. After long and careful consideration, this case is ready for decision, at least in part.

A brief recitation of the facts surrounding the petitioner's conviction would be helpful. Early on the morning of August 17, 1970, the Omaha police department received an emergency telephone call purportedly originating from 2865 Ohio Street. The caller informed the emergency operator that a girl or woman was screaming for help from a vacant house next door at 2867 Ohio Street. Several patrol cars responded to this emergency call, including that of Officer Minard. Minard and several other officers entered the vacant house. In the course of entering, the officers noticed a suitcase lying on its side in the doorway. While the search was being conducted an explosion occurred which killed Minard. At the time of the explosion Officer Minard was standing near the suitcase and apparently inspecting it. Later investigation determined that the explosion was caused by dynamite contained in the suitcase which had been rigged as a booby trap. Intensive police investigation led to the conclusion that Duane Peak was a prime suspect in the case. Peak was a known member of the National Committee to Combat Fascism (NCCF). The investigation also revealed that Edward Poindexter, an officer of the NCCF, was capable of rigging a booby trap bomb. Warrants were issued for the arrest of both Peak and Poindexter. The Omaha police conducted a search of the headquarters of the NCCF pursuant to the arrest warrants. Neither Peak nor Poindexter was found at the headquarters, but Poindexter was arrested shortly after the conclusion of the search. Prior to the bombing death of Minard, the Omaha police had received a tip that dynamite might be stored at the home of the petitioner. The Omaha police did not act on that tip until after the search of the NCCF

headquarters. That same night two Omaha police officers obtained a search warrant for the petitioner's house at 2816 Parker Street.[1] Pursuant to this search warrant and the arrest warrant for Peak, a search of this house was conducted. This search discovered several items which were subsequently introduced into evidence at the petitioner's trial: blasting caps with wire (photograph substituted), dynamite wrapper (taken from dynamite found in the house), orange grip pliers, a battery, and some dynamite. The petitioner turned himself into the police after learning that there was an arrest warrant out for him. After his arrest the petitioner's clothing was removed from safekeeping in the Douglas County, Nebraska, jail and subjected to examination by the crime laboratory of the Alcohol, Tobacco and Firearms Division of the Treasury Department in Washington, D.C. This examination revealed dynamite particles in the pockets of the clothing. This evidence was also introduced at trial. Peak was subsequently arrested and testified at Rice's trial that the petitioner was involved in the murder. The petitioner was convicted as one of the instigators of the crime.

The petitioner alleges that he is being incarcerated in violation of the United States Constitution in the following respects:

1. His conviction rests upon evidence that was seized in violation of the Fourth Amendment's prohibition of unreasonable searches and seizures in that the search of 2816 Parker Street was conducted pursuant to a search warrant which was issued without probable cause due to an insufficient supporting affidavit;

2. The search of his clothing and seizure of dynamite particles found therein was based solely on the information obtained pursuant to the illegal search of 2816 Parker Street, and the particles, therefore, became fruit of the poisoned tree, and in any

event the clothing was searched without a warrant, which in and of itself would make the search illegal.

The respondent urges that even if the search warrant was issued without probable cause, nonetheless the search of the petitioner's premises was constitutionally permissible, because the evidence was discovered incident to a search for Duane Peak pursuant to a valid arrest warrant for Peak.

The petitioner has clearly exhausted available state court remedies, as required by 28 U.S.C. § 2254(b), regarding the validity of the search warrant. The Supreme Court of Nebraska in affirming the conviction held that the search warrant was issued with probable cause. *State v. Rice,* 188 Neb. 728 (1972). Thus this court may deal with this question on the merits.

I.

The record contains no evidence that any information outside the affidavit was presented to the magistrate. In part the Supreme Court of Nebraska rested its finding of validity in the search warrant upon information which the police officers had but which was not revealed to the magistrate. In my opinion, such consideration is not acceptable under federal constitutional standards. The fundamental purpose of a warrant is to place behind the force of the warrant a detached magistrate's objective evaluation of information. He cannot evaluate information not known to him and the propriety of his action should be determined from what he knew, not from what someone else knew or later came to know. An analysis of the validity of the search warrant must be made from the affidavit alone, because nothing else was considered by the magistrate.[2]

Neither *Whitely v. Warden, Wyoming State Penitentiary,* 401 U. S. 560 (1971), nor *Draper v. United States,* 358 U. S. 307 (1959), relied upon by the Supreme Court of Nebraska, supports a contrary view.

It must be kept in mind that testing the validity of a search *warrant* is different from testing the validity of a *search* in the absence either of any search warrant or of a valid search warrant. So, also, testing the validity of an *arrest warrant* is different from testing the validity of an *arrest* in the absence either of any arrest warrant or of a valid arrest warrant.

Draper involved an arrest in the absence of any arrest warrant; *Whitely* involved an arrest in the absence of a valid arrest warrant. In each, information not presented to a magistrate was permitted for testing the validity of the *arrest,* not for the purpose of testing the validity of a *warrant.* Consistently, in the present case knowledge of the searching officers beyond that presented to the magistrate may be considered in testing the validity of the search, if the search warrant is invalid, but may not be used in testing the validity of the search warrant. For the moment, then, consideration is limited to the affidavit, because the issue is the validity of the warrant.

Additionally, the tip is essential to the validity of the warrant. This follows, since this is a search warrant and therefore must contain reasons for believing that a particular item is to be found in a particular place. The only averment linking the petitioner's house with criminal activity is the averment in the tip that Rice keeps explosives at his residence. The mere allegations that David Rice is a known member of the NCCF which advocates violent killing of police officers, that David Rice is Minister of Information of the NCCF, that a violent killing of a police officer occurred recently in Omaha, and that arrests have been made from the membership of the NCCF, would not give a magistrate probable cause to issue a search warrant for explosives at David Rice's home. This would amount to issuance of a warrant upon the basis of reputation alone, and this is forbidden by *Nathanson v. United States,* 290 U. S. 41 (1933). See also, *United States v. Harris,* 403 U. S. 573, 582 (1971). Hence, this case may be analyzed in accordance with the

line of decisions wherein tips were essential to the validity of the search warrants.

Prior to *United States v. Harris,* supra, the obvious starting place for analysis was *Aguilar v. Texas,* 378 U. S. 108 (1964). In *Harris,* the plurality opinion of Chief Justice Burger de-emphasizes the significance of *Aguilar* and takes as its benchmark *Jones v. United States,* 362 U. S. 257 (1960). This part of the Chief Justice's opinion is joined in by only two other justices, however. Moreover, the Chief Justice's opinion makes it clear that *Aguilar* is not being overruled. 403 U. S. 573, 577. Additionally, the Eighth Circuit Court of Appeals views *Aguilar* as the proper starting point despite *Harris. LeDent v. Wolff,* 460 F. 2d 1001 (C. A. 8th Cir. 1972); *United States v. Marihart,* 472 F. 2d 809, 813 n. 5 (C. A. 8th Cir. 1972); *United States v. Smith,* 462 F. 2d 456 (C.A. 8th Cir. 1972). Accord, *United States v. McNally,* 473 F. 2d 934 (C. A. 3rd Cir. 1973); *United States v. Davenport,* 478 F. 2d 203 (C. A. 3rd Cir. 1973); *United States v. Black,* 476 F. 2d 267 (C. A. 5th Cir. 1973). Therefore, this court takes as its starting place for analysis the *Aguilar* decision.

In *Aguilar* the court held that where an affidavit supporting a search warrant is based on hearsay information the magistrate must be informed of two sets of circumstances: first, some of the facts from which the informant has concluded that the items to be seized are where he claims they are; and second, some of the facts from which the officer concludes that the informant is credible or his information reliable. 378 U. S. 108, 114. The affidavit here is deficient under this standard, because no information was given to the magistrate regarding the first set of circumstances. Nothing was said regarding the basis on which the informant concluded that there was dynamite at Rice's house. The affidavit also fails the second part of the *Aguilar* standard, since the other averments in no way deal with the credibility of the unnamed informant or attempt to show that his information is reliable by, for example, detailing subse-

quent police corroboration of the tip. See *Spinelli v. United States,* 393 U. S. 410, 416-418 (1969).

This is not the end of a proper analysis however, since *Aguilar* has been supplemented by *Spinelli.* In that case the Supreme Court held that an affidavit not satisfying the *Aguilar* standard is still acceptable if the averments in the affidavit, aside from the tip, so corroborate the tip that it is "as reliable as one which passes *Aguilar's* requirements when standing alone." 393 U. S. at 416. When, as here, the manner in which the informant gathered his information is not told to the magistrate, the court in *Spinelli* held:

> " . . . (I)t is especially important that the tip describe the accused's criminal activity in sufficient detail that the magistrate may know that he is relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation."
>
> 393 U. S. at 416

Spinelli used *Draper v. United States,* 358 U. S. 307 (1959), as the standard for determining whether the tip described the criminal behavior in sufficient detail. In *Draper,* which as mentioned above involved probable cause to arrest without a warrant, the tip stated the address in Denver where the suspect had taken up residence; that the suspect had gone to Chicago on September 6, 1956, by train; that he was going to bring back three ounces of heroin; that he would return by train either on the morning of September 8, 1956, or the morning of September 9, 1956; that the suspect was a Negro of light brown complexion, 27 years old, 5 feet 8 inches tall, weighed about 160 pounds, and would be wearing a light colored raincoat, brown slacks and black shoes; that he would be carrying a tan zipper bag; and that he habitually walked fast. The obvious intent of the standard announced in *Spinelli* is to give the magistrate sufficient detail to make it apparent that the informant gathered

his information in a reliable manner and was not simply repeating unfounded rumors. The mere statement that "Rice keeps explosives, at his residence, and also illegal weapons, which he has said should be used against Police Officers" does not describe the criminal behavior in the detail required by *Spinelli.*

Spinelli should not be read, however, as saying that the only way to make up for an affidavit deficient in the light of *Aguilar* is to describe the criminal behavior in a very detailed manner. The court goes on to state:

> "This is not to say that the tip was so insubstantial that it could not properly have counted in the magistrate's determination. Rather, it needed some further support. When we look to other parts of the application, however, we find nothing alleged which would permit the suspicions engendered by the informant's report to ripen into a judgement that a crime was probably being committed.
>
> 393 U. S. at 418

The relevant judgment here would be that David Rice's home contained dynamite and other illegal weapons. The affidavit in *Spinelli,* in addition to stating a tip concerning the operation of a handbook and wagering by telephone, contained a report of detailed F.B.I. surveillance on Spinelli, a confirmation that the telephone numbers listed in the tip were those of an apartment which the F.B.I. observed Spinelli enter, and an affirmation by the F.B.I. agent seeking the warrant that Spinelli was known to him and to local law enforcement officials as a bookmaker and gambler and associate of gamblers and bookmakers. The Supreme Court held that the behavior detailed by the F.B.I. surveillance contained no suggestion of criminal conduct and that the reputation for criminal behavior may not be used to give additional weight to allegations that would otherwise be insufficient. In Rice's case, the averments that he is a member and Minister of Information of the NCCF which advocates the violent killing of police, that a policeman has been killed, and

that arrests have been made from the membership of the NCCF, in no way suggest that dynamite would probably we stored at the petitioner's house. Perhaps such averments make it more likely that dynamite would be found in Rice's house than in the house of someone else whom an unnamed informant accused of storing dynamite and about whom nothing else was known. But they do not lend sufficient support to the tip to permit suspicion to harden into a judgment that dynamite was probably in Rice's house. Mere advocacy does not in and of itself license the police to search the premises of the advocate. Such activity, provided it does not involve incitement to specific acts, is constitutionally protected free speech. *Yates v. United States,* 354 U. S. 298, 318-19 (1957). The violent killing of a police officer would certainly render suspect a group advocating the violent killing of police. The fact that arrests had already been made from the group would further heighten suspicion of involvement in the crime by the group. The strongest implication, however, that can be drawn from these assertions is that dynamite probably was on the premises of some member of the group at some time. They do not imply that dynamite was probably on Rice's premises at the time the warrant was sought. It is this latter inference that the standard of probable cause requires to be made. *Brinegar v. United States,* 338 U. S. 160 (1949). The only averment besides the tip that singles the petitioner out is the one that he is Minister of Information. But being Minister of Information does not imply that one probably stores dynamite and other illegal weapons. Perhaps if the allegation were that Rice was Weapons Minister or something of that sort, it would help tighten the inference down to a particular place. The key failing of the averments, then, is that they fail to tie down the storage of dynamite to any particular place. Such particularity is required before a search warrant may issue.

While I do not think that *Harris* changed the standards of *Aguilar* and *Spinelli,* it may be useful to analyze the present case against the factual setting of *Harris.*

Chief Justice Burger's plurality opinion in *Harris* relies upon *Jones v. United States,* 362 U. S. 257 (1960), for setting the standard for the quantum of information necessary to support a belief that an unidentified informant's information is truthful. The affidavit in *Jones* concerned the tip of an unidentified informant who claimed that he had recently purchased narcotics from the defendant. The tip also described the apartment where the informant alleged he had purchased the narcotics. The remainder of the affidavit swore that the informant was familiar to the affiant, that the informant had given information to the affiant before and that that information was accurate, and that the same information was given by other informants. Moreover, the tip itself was an admission against penal interest. In applying *Jones* to the facts in *Harris,* the Chief Justice characterizes *Jones* as stating that the affidavit is sufficient if there is a substantial basis for crediting the hearsay of the informant. The affidavit in *Harris* related a tip that the informant had purchased illicit whiskey from Harris at a specific house. It also stated that Harris had a reputation personally with the affiant as being a trafficker in nontaxpaid distilled spirits, that the affiant had received information from a variety of sources concerning Harris' activities, that illicit whiskey had actually been found on Harris' premises before, and that the affiant found the informant to be "prudent." The Chief Justice found substantial basis for crediting the hearsay here for the following reasons: first, it purported to relate the personal observations of the informant; second, it recited prior criminal behavior supporting of the reputation for criminal behavior; and third, the statement of the informant was against his penal interest. 403 U. S. at 581, 583. The Chief Justice noted that the affidavit contained no averment that the informant had previously given correct information as did the affidavit in *Jones.* The absence of such an averment, however, was found not essential to meeting the standard set down by *Jones.* 403 U. S. 573, 581-82. Applying the three factors critical to upholding the affidavit in *Harris* to the affidavit be-

fore this court, it can be seen that none of the three is present. The informant does not purport to relate his own personal observations; there is no recital of prior criminal acts by the petitioner to support a reputation for violence against police; and the statement of the informant is in no way against his penal interest. Hence, the affidavit in this case does not contain the pivotal facts relied upon by Chief Justice Burger in *Harris*.

Therefore, it is the holding of this court that the affidivat supporting the request for a search warrant did not give the magistrate probable cause to issue the warrant and that the warrant was therefore issued without probable cause.

II.

Even assuming the invalidity of the search warrant, the respondent argues that the search and seizure of the dynamite were proper, because done under exigent circumstances or in the course of a lawful search for Duane Peak.

The arguments on both sides of these questions were fully briefed to the Supreme Court of Nebraska in the petitioner's criminal appeal. The opinion of that court hints that the search and seizure might have been upheld on either of these grounds given the evidence before the court, but these issues were not explicitly decided by the Supreme Court of Nebraska, since it upheld the validity of the search warrant. This status of the case raises the question of whether the requirement of Title 28 U. S. C. § 2254(b) that available state court remedies be exhausted before the federal district court may reach the merits of an issue raised on habeas corpus has been fulfilled.

It is clear from *Picard v. Connor*, 404 U. S. 270 (1971), that all that is required is that the issue raised on federal habeas was previously fairly presented to the state's highest court. For a gloss on what this means the court cites *Wilwording v. Swenson*, 404 U. S. 249

(1971); *Roberts v. LaVallee*, 389 U. S. 40 (1967); and *Brown v. Allen*, 344 U. S. 443 (1953). None of these cases rests on drawing a distinction between presenting an issue to the state's highest court and presenting that issue and having it decided by the state's highest court. The thrust of these decisions is that once an issue has been decided by the state's highest court, that is sufficient for exhaustion even though the petitioner could use some other procedural device to challenge his conviction again in the state courts at the time the court is deciding the habeas matter.

Nevertheless, the language of *Picard* and of *Fay v. Noia*, 372 U. S. 391 (1963), is that of fair presentation and of an "opportunity to pass upon." Nowhere is there language suggesting that the state court must in fact pass upon the issue. *Picard* puts a paragraph gloss upon the requirement of fair presentation. The critical element is that the state court has the first opportunity to hear the very claim urged in federal court. In support of this proposition the court cites *Darr v. Burford*, 339 U. S. 200 (1950), and *Davis v. Burke*, 179 U. S. 399 (1900). Both of these cases also speak of the presentation of the issue first to the state court and are otherwise unilluminating.

Picard offers further enlightenment on what fair presentation means by holding that the presentation of the same facts to state court is not sufficient. The same constitutional claim must be brought to the attention of the state courts. The most telling paragraph of the entire opinion is as follows:

> ". . . Obviously there are instances in which 'the ultimate question for disposition,' *United States ex rel. Kemp v. Pate*, 359 F. 2d 749, 751 (CA7 1966), will be the same despite variations in the legal theory or factual allegations urged in its support. A ready example is a challenge to a confession predicated upon psychological as well as physical coercion. See *Sanders v. United States*, 373 U. S. 1, 16 (1963). Hence, we do not imply that respondent could have

raised the equal protection claim only by citing 'book and verse on the federal constitution.' *Daugharty v. Gladden*, 257 F. 2d 750, 758 (CA9 1958); see *Kirby v. Warden*, 296 F. 2d 151 (CA4 1961). We simply hold that the substance of a federal habeas corpus claim must first be presented to the state courts . . ."
404 U. S. at 277-78

The thrust of this paragraph and the cases cited therein as that exhaustion does not require either identity of legal theory or of factual allegation. The *Kemp* case is most enlightening in that it seems to require that the evidence in the record before the state court be essentially the same as that before the federal habeas court. The court in *Daugharty* arrives at essentially the same position in stating that the state court must be provided with all of the facts necessary to give application to the constitutional principle upon which the petitioner is relying. Neither of these cases, however, appears to be cited by the Supreme Court for the purpose of noting this part of the opinion.

The proper conclusion of all of this is that the United States Supreme Court opinions leave open the precise question before this court—namely, whether the Supreme Court of Nebraska was presented the substance of the federal habeas claim.

Further help may be found in *LeDent v. Wolff*, 460 F. 2d 1001 (C. A. 8th Cir. 1972). The court in footnote 2 states that the Supreme Court of Nebraska did not have the opportunity to pass upon an issue which was presented to it, since there was "no meaningful record for it to review on this issue." In *LeDent* no testimony was produced on the issue raised to the Supreme Court of Nebraska.

Thus this court must follow the standard announced in *LeDent*. After a careful reading of the entire record before the Supreme Court of Nebraska touching these issues, including the recently submitted police reports which were introduced into evidence in the hearing on the motion to suppress which took place prior to the petitioner's trial, it is the holding of this court that there was a meaningful record before the Supreme Court of Nebraska from which it could have decided these issues. Thus there has been exhaustion of available state court remedies and this court may decide these issues on their merits.

Before this court makes such a decision, however, it is desirable that all possible evidence on these issues be presented. This court has plenary power to conduct an evidentiary hearing and to try facts anew in cases involving the issuance of the writ of habeas corpus. *Townsend v. Sain*, 372 U. S. 293 (1963). I am hopeful that the record can be made more complete in the following two respects: first, evidence bearing on the issue of probable cause to believe that Duane Peak was in the petitioner's house at the time the search was conducted; and second, evidence bearing on the issue of whether the dynamite found in the petitioner's basement cubbyhole was in an area in which a man could hide and was in plain view.

This evidentiary hearing limited to these issues should be held as expeditiously as possible, since this case has been under consideration by this court for a very long time. The time for the hearing will be set by separate order following consultation with attorneys for the respective parties.

Dated March 29, 1974.

BY THE COURT

WARREN K. URBOM
Chief Judge

Footnote 1. The affidavit in support of the search warrant reads as follows:

"The complaint and affidavit of Sgt. R. Pfeffer and Sgt. Jack Swanson, on this 22 day of August 1970, who, being first duly sworn, upon oath says:

"That he has just and reasonable grounds to believe, and does believe that there is concealed or kept as hereinafter described, the following property, to-wit: Dynamite and devices which could be used to construct devices which could cause injury to persons and damage to property. Also illegal weapons which he stated should be used against Police Officers.

"That said property is concealed or kept in, on, or about the following described place or person, to-wit: A one story white frame house on Parker Street at 2816, In Omaha Douglas County, Nebraska.

"That said property is under the control or custody of David Lewis RICE, Minister of Information, National Committee to Combat Fascism.

"That the following are the grounds for issuance of a search warrant for said property and the reasons for his belief, to-wit: David Rice is a known member of the National Committe [sic] to Combat Fascism, which advocates the violent killing of Police Officers. A violent killing of a Police Officer occured [sic], in Omaha, and arrests were made from the membership of the CCF. We have been told in the past that RICE keeps explosives, at his residence, and also illegal weapons which he has said should be used against Police Officers.

"A warrant authorizing a night-time search is requested because Nighttime when information was secured, and the property may be removed.

"WHEREFORE, he prays that a search warrant may issue according to law."

Footnote 2. **Aguilar v. Texas**, 378 U.S. 108, 84 S. Ct. 1509 (1964); **Giordenello v. United States**, 357 U.S. 480, 75 St. Ct. 1245 (1958); **Wangrow v. United States**, 399 F. 2d 106 (C. A. 8th Cir. 1968), cert. denied 393 U.S. 933, 89 S. Ct. 292; **United States v. McDonnell**, 315 F. Supp. 152 (U.S.D.C. Neb. 1970). A possible exception is evidence tending to discredit or impeach the assertions of the affidavit. **United States v. Roth**, 391 F. 2d 507 (C.A. 7th Cir. 1967).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

David L. Rice,

Petitioner,

v.

Charles L. Wolff, Jr., Warden of the
Nebraska Penal and Correctional Complex,

Respondent.

MEMORANDUM OF DECISION

(Filed July 5, 1974)

CV72-L-303

APPEARANCES: For petitioner, David L. Herzog
For respondent, Met Kammerlohr,
Assistant Attorney General

URBOM, Chief Judge

Pursuant to the memorandum and order of this court dated March 29, 1974, an evidentiary hearing was held on June 11, 1974, on the following issues: First, whether there was probable cause to believe that Duane Peak was in the petitioner's house on the night of August 22, 1970; and second, whether the objects found in the search of the house and introduced at the petitioner's trial were in plain view.

The issues as yet unresolved by this court are:

A. Whether the introduction into evidence of the dynamite and other items found in the petitioner's house on August 22, 1970, can be justified on the ground that the police were rightfully on the petitioner's premises to execute an arrest warrant for Duane Peak and the evidence was found in plain view;

B. Whether the introduction of these items into evidence can be justified on the ground that exigent circumstances were present at the time of the search of the premises; and

C. Whether the reception into evidence of dynamite particles found in the clothing of the petitioner after his arrest was constitutionally permissible.

If issue numbered A is to be resolved in favor of the respondent, it must appear, first, that the police were rightfully on the premises, and second, that the evidence seized was in plain view. The second question need not be reached if the police were not rightfully on the premises. Therefore, the first question to be resolved is whether the police were rightfully on the petitioner's premises in executing an arrest warrant for Duane Peak.

Resolution of this first issue depends initially upon whether the police were in fact at David Rice's house to execute an arrest warrant for Duane Peak. This need not have been their sole purpose in entering the house, but it must be one of their purposes. See *Jones v. United States,* 357 U. S. 493, 499-500 (1958). The record as a whole reveals that one of the officers' purposes in being at Rice's house was to arrest Duane Peak.

There is some discussion in the brief of the petitioner that the arrest warrant for Duane Peak was invalid, but there is no substantial evidence to support this claim and the issue has not been pressed by the petitioner. Hence, the discussion that follows will assume that the police had a valid arrest warrant for Duane Peak.

Testimony before this court in the evidentiary hearing just completed revealed that none of the officers participating in the search of the petitioner's premises had the arrest warrant for Duane Peak personally in his possession. Such possession is not required by the Constitution in order to validate an entry to effect an arrest. *United States v. Leftwich,* 461 F. 2d 586 (C. A. 3rd Cir. 1972), cert. denied, 409 U. S. 915; *Gill v. United States,* 421 F. 2d 1353 (C. A. 5th Cir. 1970), cert. denied, 400 U. S. 851. See Rule 4(c) (3) of the Federal Rules of Criminal Procedure.

The issuance of a valid arrest warrant, however, does not serve as a license to the police to enter a private dwelling to affect an arrest. The Fourth Amendment secures to the people of this nation "the right . . . to be secure in their persons, h o u s e s, papers, and effects, against unreasonable searches and seizures." In interpreting the meaning of this fundamental guarantee courts have held that a search is not reasonable unless the officer executing the arrest warrant had probable (or reasonable) cause to believe that the person named in the warrant is on the premises at the time of the entry. *Jones v. United States,* 357 U. S. 493 (1958); *United States v. Brown,* 467 F. 2d 419 (C. A. D. C. Cir. 1972); *Dorman v. United States,* 435 F. 2d 385 (C. A. D. C. Cir. 1970); *Michael v. United States,* 393 F. 2d 22 (C. A. 10th Cir. 1968); *United States v. Harris,* 391 F. 2d 384 (C. A. 6th Cir. 1968); *United States v. Chambers,* 382 F. 2d 910 (C. A. 6th Cir. 1967); *Lankford v. Gelston,* 364 F. 2d 197 (C. A. 4th Cir. 1966); *United States v. Alexander,* 346 F. 2d 561 (C. A. 6th Cir. 1965); *United States v. Blair,* 366 F. Supp. 1036 (U.S.D.C. S.D. N.Y. 1973); *United States v. Watson,* 307 F. Supp. 173 (U.S.D.C. D.C. 1969); *United States v Sims,* 231 F. Supp. 251 (U.S.D.C. Md. 1964). See D. Rotenberg and L. Tanzer, "Searching for the Person to be Seized." 35 Ohio State Law Journal 56-77 (1974) and Note, "The Neglected Fourth Amendment Problem in Arrest Entries," 23 Standford Law Review, 998-1008 (May 1971). The rationale for this requirement is that,

unless the person sought is on the premises, the officer executing the arrest warrant cannot accomplish his task, and entrance into the home to execute an arrest warrant should be permitted only when such entrance has a reasonable probability of achieving its goal.

The question for resolution, then, is whether the police had probable (or reasonable) cause to believe that Duane Peak was in the petitioner's house on the night of August 22, 1970. The courts noted above do not shed much light on just what probable or reasonable cause means in these circumstances. In the context of discussing probable cause to arrest the Supreme Court of the United States has offered some elucidation of the term. In *Brinegar v. United States,* 338 U. S. 160 (1949), the court said that the substance of all the definitions of probable cause is a reasonable ground for belief. It is more than a bare suspicion. Rather, "Probable cause exists where 'the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed. *Carroll v. United States,* 267 U. S. 132, 162." 338 U. S. at 175-176. See also *Draper v. United States,* 358 U. S. 307, 313 (1959), and *Terry v. Ohio,* 392 U. S. 1, 21-22 (1968). The only court to articulate the standard in the context of determining probable cause to enter private dwellings to execute arrest warrants, even by implication, is the Fourth Circuit Court of Appeals in *Lankford v. Gelston,* 364 F. 2d 197 (C. A. 4th Cir. 1966). In that case the court gave its approval to a statement of the law of arrest in a regulation issued by the Police Commissioner of Baltimore. The regulation's relevant portions are as follows:

> "A police officer may make a peaceable or a forcible entry to search any premises for the purpose of arresting a person for whom an arrest warrant has been issued, if, but only if, the officer has probable cause to believe the accused person to be on the premises to be searched.

> "In this context, 'probable cause' is said to exist where the facts and circumstances within the officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution to believe that the accused person is on the premises to be searched."
>
> 364 F. 2d at 200-201, n. 4

This standard, as is obvious, is deduced from the standard for probable cause in other settings. Such a deduction is eminently reasonably and will be adopted by this court as setting the constitutional standard.

Having achieved some articulation of the standard, this court is now in a position to assess the facts of this case. In so assessing the facts it is well to bear in mind that the burden of persuasion is on the petitioner to convince this court that the evidence should have been suppressed and thus that the police did not have probable cause to believe that Duane Peak was on the petitioner's premises on the night in question.

The evidence shows that the police at the time of the search knew of the following facts arguably showing a connection between Duane Peak and David Rice's house:

1. Duane Peak was a member and David Rice and Edward Poindexter were officers of the NCCF, which advocated violence against the police, and which had a limited membership;

2. David Rice's house had been used at times as a meeting place for the NCCF;

3. David Rice and Edward Poindexter had written articles in the NCCF newspaper urging violence against the police;

4. The focus of the investigation of the Minard killing was then on the NCCF;

5. There was probable cause to believe that Duane Peak planted the suitcase bomb that killed Officer Minard;
6. Donald Peak, Jr. implicated Edward Poindexter;
7. Arrest warrants had been issued for Duane Peak and Edward Poindexter;
8. An informant had told the police that he overheard David Rice in discussing the bombing say that the action was a week late and that Rice then laughed;
9. Another informant had told the police that David Rice had received orders from New York either to kill a police officer or lose the Panther franchise;
10. The police had reports that there was dynamite in the community that had not yet been found;
11. Duane Peak had been at David Rice's house in the past, but there had been no reports of his being there since the bombing;
12. Unsuccessful attempts had been made immediately before the search of Rice's house to find Duane Peak at the NCCF headquarters and at the home of Frank and Will Peak's parents, and generally on the near north side in Omaha;
13. The lights and television were on at David Rice's house when the police arrived, but no one responded to their knock at the door;
14. While Sergeant Swanson was at police headquarters typing out the search warrant affidavit there was a report that Duane Peak was in the Spencer Street Housing Project, the location of which is not revealed in the record;
15. None of the police reports of interviews with Duane Peak's relatives prior to the search of David Rice's house give any indication that Duane could be found at David Rice's house.

There was further testimony before this court which, if believed, would tighten the connection between Duane Peak and David Rice's house. Lieutenant James G. Perry testified that Delia Peak had told him that David Rice, Duane Peak and Edward Poindexter were constant companions and that he, Lt. Perry, was present when Donald Peak, Jr. told Officer Pitmon Foxall that Duane Peak was at David Rice's house when the bomb was made. Lt. Perry also testified that Duane Peak had not been seen in the last two days by his family and that they expressed concern that he may have been eliminated. The remainder of the record before this court specifically contradicts the claim that the police knew from Donald Peak, Jr. that Duane Peak was in David Rice's house when the bomb was made. These are the facts in the record: First the detailed police reports of Pitmon Foxall on his interviews with Donald Peak, Jr. on August 22, 1970, make no mention of Duane Peak's being at the Rice house when the bomb was made; second, no such fact was mentioned by either Lt. Swanson or Sgt. Pfeffer either before this court or in testimony at the state trial; third, no mention of this crucial fact was made in the affidavit to support the search warrant for searching David Rice's house; fourth, the rights advisory forms signed by Donald Peak, Jr. before his interviews on August 22, 1970, positively indicate that no one else was present at these interviews besides Donald Peak, Jr. and Officer Foxall; and fifth, the intial warrant for the arrest of David Rice was for possession of explosives and not for conspiracy to commit first degree murder, and this warrant did not issue until after the search of Rice's premises. This last consideration is significant, because immediately following Donald Peak, Jr.'s interviews, in which Duane Peak and Edward Poindexter were implicated in the murder, arrest warrants were issued for them charging them with first degree murder. Had Donald Peak, Jr. so implicated David Rice, surely a similar arrest warrant for him would have been issued at that time. Given these facts I simply cannot credit this testimony of Lt. Perry.

The fact that one part of Lt. Perry's testimony is not credible does not necessarily imply that the remainder is similarly tainted; by itself, it simply raises a question concerning his memory. Lt. Perry's testimony that Delia Peak told him that Duane Peak, Edward Poindexter and David Rice were constant companions is in no way corroborated by the remainder of the record before me. The police report of her interview reveals nothing about Duane Peak's being a constant companion of David Rice's, and the rights advisory form she signed indicates that only Sgt. R. Alsager and Richard Curd were present for her interview. Moreover, her interview did not begin until the very hour police first approached David Rice's house and was not completed until after the decision had been made to enter his house. The police report of her interview also reveals that she had seen Duane Peak at about 5:00 p. m. the night before. Thus, it simply is not so that Duane Peak's family had not seen him in the two days before they entered the petitioner's house and is persuasive that Delia Peak did not make a contrary statement. Finally, there is no indication in the police reports of interviews with Duane Peak's family prior to the entry of Rice's house that they were concerned that he might have been eliminated. On the basis of the entire record before this court and having heard and seen Lt. Perry testify, it is impossible for me to credit his testimony in the respects mentioned. Consequently, I find that his testimony in these respects cannot be included in the above catalogue of facts within the knowledge of the police at the time they entered the home of David Rice.

Lt. Perry also testified that he was the person who put David Rice's house on the list of places to look for Duane Peak. He testified that he did so because Delia Peak told him that David Rice, Duane Peak and Edward Poindexter were constant companions and because Donald Peak, Jr. told Officer Foxall that Duane Peak was at Rice's house when the bomb was made. Since both of these statements are not creditable, the most that can be said is that the record does not reveal why Lt. Perry placed

Rice's house on the list of places to be searched for Duane Peak. Lt. Swanson testified that the only information he had tying Duane Peak to the house was that Duane Peak and David Rice were members of the NCCF and that Duane Peak had been known to go to that house for meetings.

Based on the above catalogue of facts it is the finding of this court that the police officers did not have probable cause to believe that Duane Peak was in David Rice's house at the time they searched it on August 22, 1970. The critical considerations are that the place searched was not the residence of the person sought pursuant to the arrest warrant, that there had been no reports of Duane Peak's being at the home of David Rice for at least five and a half days prior to entry, that none of Duane Peak's family suggested looking for him there, and that the police had a contemporaneous report that Duane Peak was elsewhere. Such facts could not warrant a man of reasonable caution to believe that Duane Peak was in the house at the time of entry. It is a fair inference from the facts to say that Rice's house was a place Duane Peak might be. But this was not sufficient to permit entry, absent consent from the person whose house it was. The fact that the television and lights were on and there was no response to the police knock certainly would authorize the inference that someone had been there recently. Whether it, standing alone, would authorize the inference that someone was there at the time is questionable. In *United States v. Watson*, 307 F. Supp. 173 (U.S.-D.C. D.C. 1969), the court held that the facts that the police had called the house of the person to be arrested prior to going to the house and received a busy signal and that the radio was playing when the police arrived at the house did not give the police probably cause to believe the homeowner was at home at the time of entry, since they saw and heard no other signs of physical presence. I need not decide this issue, however, because in any event the fact that the lights were on and the television playing in no way indicated that Duane Peak was a person present at David Rice's house.

This court is not unmindful of the case of *Vance v. State of North Carolina,* 432 F. 2d 984 (C.A. 4th Cir. 1970), which held that on the facts before it the absence of an indication in the record that the police had any particular reason for believing that the person sought pursuant to the arrest warrant was on the premises searched was not fatal to the validity of the conviction in question. The crucial fact distinguishing this case is that the premises in question in *Vance* were the premises of the person sought in the arrest warrant. Here, Peak did not live at or own the premises searched. Moreover, the court in *Vance* stressed that the entry was made in the early afternoon and not at night. Hence, the rule announced by the court in *Vance,* read against the background of *Lankford v. Gelston,* supra, appears to be that if the entry is made during normal daylight hours, the police have probably cause to believe that the person sought in an arrest warrant is at his home. Whatever the validity of this rule in this circuit, it has no application to this case.

My decision that there was not probable cause to believe that Duane Peak was at David Rice's house at the time of the search in no way will seriously hamper proper police investigation of crimes such as the murder of Officer Minard. Had Duane Peak in fact been in Rice's house a careful police surveillance of the house would no doubt have revealed his presence while at the same time preserving the fundamental rights guaranteed by the Fourth Amendment. Such surveillance procedures may take somewhat longer to apprehend the person sought, but the price of shortening the search by allowing an arrest warrant to serve as a license to search private dwellings where the person sought *might be* simply is too high.

The respondent has pressed another argument for allowing police presence in David Rice's house at the time of the search. In oral argument before this court following the evidentiary hearing the respondent argued

that the existence of exigent circumstances should reduce the level of probable cause required. This argument is urged both as to the search for the dynamite and the search for Duane Peak.

The doctrine of exigent circumstances was developed originally in regard to warrantless searches for things. See *McDonald v. United States,* 335 U. S. 451, 456 (1948). The basic theory is that in certain exigent circumstances a search without a search warrant is reasonable under the Fourth Amendment. See *Terry v. Ohio,* 392 U. S. 1, 20 (1968). This theory has also been extended to apply to searches for persons. *Warden v. Hayden,* 387 U.S. 294, 298 (1967). Its application in these circumstances, however, has been limited to holding that a warrant was not necessary prior to entry. It has not, so far as this court can tell, been applied to hold that in certain circumstances the standard for probable cause is reduced. In fact, just the contrary seems to be true. In *Dorman v. United States,* 435 F. 2d 385 (C. A. D. C. Cir. 1970), the court indicates that a higher degree of probable cause is required for police action without the prior approval of the court.

Concerning justification for a warrantless search for the dynamite little need be said. The standard is that announced in *Coolidge v. New Hampshire,* 403 U. S. 443, 454-55 (1971):

> "... [T]he most basic constitutional rule in this area is that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.' The exceptions are 'jealously and carefully drawn,' and there must be 'a showing by those who seek exemption ... that the exigencies of the situation made that course imperative.' '[T]he burden is on those seeking the exemption to show the need for it.'"

What are the exigencies that the respondent relies on? No concise list has been offered, but the following circumstances appear to be of concern to the respondent:

1. The murder was a terror bombing of a policeman;
2. There had been previous bombings that summer of police facilities;
3. The police had information that there was some missing dynamite out in the community;
4. The police feared further bombings;
5. The police had been working extremely long hours to solve this murder;
6. The investigation had focused on an organization that advocated violence against police.
7. Duane Peak might be eliminated.

This set of circumstances does not fit into any of the exigent circumstances exceptions to the warrant requirement that this court is aware of. There was no hot pursuit, no indication of a bomb about to go off, no cry for help from within, no arrest for a search to be incident to, and this was the search of a home and not an automobile or other readily moveable object. Moreover, the police by their own behavior in taking the time to secure a search warrant state a strong argument for holding that the situation was not so volatile as to require bypassing the magistrate. This is particularly true here where the source of their information concerning the presence of dynamite in David Rice's house was a tip that was given to the police at least three weeks and perhaps as long as two and one-half months prior to the entry of Rice's house. Moreover, the tip itself was not very positive about the dynamite being at Rice's house. At the hearing on the motion to suppress in the state criminal trial, Lt. (then Sergeant) Swanson testified as follows concerning the tip:

> "I was told at one time that if there was dynamite in town and if the NCCF had it, that David Rice's house would be one of the places they might store it." (Transcript, Vol. II, 130:13-15).

Finally, there is no evidence in the entire record as to the reliability of the informant who gave this tip.

Given this record, this court will not carve out another exception to the warrant requirement. In so refusing, this court is mindful of what the Supreme Court of the United States said in *Coolidge v. New Hampshire*, supra, after stating that the exceptions to the warrant requirement are to be jealously drawn:

> ". . . In times of unrest, whether caused by crime or racial conflict or fear of internal subversion, this basic law and the values that it represents may appear unrealistic or 'extravagent' to some. But the values were those of the authors of our fundamental constitutional concepts. In times not altogether unlike our own they won—by legal and constitutional means in England, and by revolution on this continent—a right of personal security against arbitrary intrusions by official power. If times have changed, reducing everyman's scope to do as he pleases in an urban and industrial world, the changes have made the values served by the Fourth Amendment more, not less, important." 403 U. S. at 455.

Concerning the search for Duane Peak, even less need be said. There is no doubt that it was imperative to find Peak quickly, perhaps for his own safety and certainly to apprehend a dangerous person and to further the investigation of a violent crime suffused with racial hatred. But the necessity here is no greater than it was in *Lankford v. Gelston*, supra, which intimates no reduction in the standard of probable cause to enter the private home of a third party. The respondent's argument that speed in apprehension was this imperative is weakened by the fact that the police took an hour out from their search for Duane Peak to secure a search warrant

for David Rice's house. Finally, it makes little sense, even from the point of view of speed in locating a suspect, to spend police time looking for him at a place where one does not have a reasonable belief that he will be. Thus, on this point also, I find no need to expand the doctrine of exigent circumstances.

Before turning to the last issue still unresolved by this court, a word about one other argument of the respondent is necessary. The respondent argues that this court should take account of the significant public interest involved in apprehending Duane Peak and balance this against the minimal invasion of privacy that took place in searching David Rice's empty house when Rice himself gave permission for anybody to stay in his house. No one can doubt the important public interest in apprehending an accused murderer of a police officer, but I think the respondent seriously mischaracterizes the interest involved in preventing invasions of privacy by the police. The privacy of one's home and the concomitant ability to decide whom it shall shelter and when is one of the most precious rights we possess as citizens. Entry into the home by police absent probable cause to so enter is precisely what the Fourth Amendment forbids. Apprehension of a dangerous criminal outweighs this interest in the p r i v a c y of one's home only if there is probable cause to believe that the criminal is in that home.

Therefore, it is the holding of this court that the police were not rightfully on the premises of David Rice on the night of August 22, 1970, and thus all of the evidence obtained by the search of the house that night was seized in violation of the Fourth Amendment and should not have been received into evidence at the petitioner's criminal trial.

The remaining unresolved issue concerns the introduction into evidence of the dynamite particles found in David Rice's clothing. These particles were obtained from the clothing that the petitioner wore at the time of his

arrest. The warrant upon which the petitioner was arrested and arraigned charged him with possession of an explosive substance. It did not charge him with murder or conspiracy to commit murder. (In fact, no murder warrant for his arrest was sworn out until August 31, 1970, the day on which Duane Peak first indicated that the petitioner was involved in the murder.) The petitioner turned himself in to the police when he heard that he was being sought. His clothing was taken from the petitioner as a part of the normal routine at the Douglas County jail for incarcerating persons accused of crime. The clothing was turned over by one of the jailers on August 27, 1970, a few hours after the petitioner surrendered himself, to Special Investigator Richard Curd of the Alcohol, Tobacco & Firearms Division of the Internal Revenue Service, who had participated in the search of Rice's house. Subsequently the clothing was sent to that Division's national laboratory in Washington, D. C., where the determination was made that certain particles found in the pants pockets were dynamite of the type that was used in the murder of Officer Minard.

The petitioner argues that this evidence should have been suppressed because it was obtained without a search warrant and because it is the "fruit of the poisonous tree." The petitioner's first argument has already been definitively answered by the Supreme Court of the United States in *United States v. Edwards,* — U. S. — (March 26, 1974). In that case the court held that the police are entitled to take the clothing of one validly arrested and subject it to laboratory tests and that those test results are admissible at trial. A search warrant need not be procured in such a situation.

The petitioner's second argument is of greater merit. His contention that the police would not have come upon the dynamite particles but for the arrest warrant which was issued as a direct result of the illegal search of his home is correct. Thus, the dynamite particles are taint-

ed with the illegality of the search and should also have been suppressed.

The doctrine of the "fruit of the poisonous tree" was first enunciated in *Silverthorne Lumber Co. v. United States,* 251 U. S. 385 (1920). There the court held that evidence illegally obtained by the police may not be used by the police in any way. Prior to *Silverthorne* the court had held in *Weeks v. United States,* 232 U. S. 383 (1914), that such evidence could not be introduced against the defendant at trial. *Silverthorne,* however, contained a limitation on the prohibition of the use of illegally obtained evidence:

> ". . . Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, . . ." 251 U. S. at 392

This limitation was again stressed in *Nardone v. United States,* 308 U. S. 338 (1939), in which the term "fruit of the poisonous tree" was first used. In *Nardone* the Supreme Court acknowledged that:

> ". . . Sophisticated argument may prove a causal connection between information obtained through illicit wire-tapping and the Government's proof. As a matter of good sense, however, such connection may have become so attenuated as to dissipate the taint. . . ." 308 U. S. at 341.

The germinal opinion for analysis of the doctrine, however, is *Wong Sun v. United States,* 371 U. S. 471 (1963):

> ". . . We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.' Maguire, Evidence of Guilt, 221 (1959). . . ." 371 U. S. at 487-88.

This federally developed principle is applicable to the states. *Mapp v. Ohio,* 367 U. S. 643 (1961).

The critical question here is whether the dynamite particles were discovered by means sufficiently distinguishable from the illegal search to be purged of the primary taint. A careful reading of numerous appellate court decisions on what means are sufficiently distinguishable leaves one with the impression that this doctrine is not one of unadulterated clarity. There is very little law on the subject by the Eighth Circuit Court of Appeals. See *Peterson v. United States,* 411 F. 2d 1074 (C. A. 8th Cir. 1969), and *Standard Oil Co. v. State of Iowa,* 408 F. 2d 1171 (C. A. 8th Cir. 1969). Both cases assert that if the evidence is gained from a source independent of the illegal behavior, the evidence is admissible. In *Peterson,* the evidence was discovered prior to and thus independent of the illegal search and seizure. In *Standard Oil,* the court held that evidence seized illegally could be introduced at a later trial if the evidence was later obtained through authorized discovery proceedings. In so holding it determined at least one acceptable definition of an independent source. Such a source would include information available to the plaintiffs without resort to any clue or knowledge gained from the items unlawfully seized. 408 F. 2d at 1177. A reading of these cases together with several others' convinces this court that in order to purge the taint of the illegal search it must be shown that the discovery of the evidence was primarily attributable to a source independent of the illegal search. The fact that there was an intervening independent source which was also a "but for" cause of the discovery does not by itself remove the taint of the illegal search, if the illegal search nevertheless formed

the primary motivation or basis for the discovery of the evidence.

Before analyzing the evidence in light of this standard one preliminary question must be dealt with: Which party bears the burden of proof that the evidence used is poisoned fruit? *Alderman v. United States,* 394 U. S. 165, 183 (1969), and *Harrison v. United States,* 392 U. S. 219, 224-25 (1968), make it clear that in a direct criminal appeal the government, once an illegal search has been shown by the defendant, bears the ultimate burden of persuasion that the evidence introduced at trial is free from the illegal taint. It is equally clear that the general rule in habeas corpus actions is that the burden of persuasion is on the petitioner. *Johnson v. Zerbst,* 304 U. S. 458, 468-69 (1938); *Hawkins v. Bennett,* 423 F. 2d 948 (C. A. 8th Cir. 1970). Courts have drawn various exceptions to this general rule, however. *Naughten v. Cupp,* 476 F. 2d 845 (C. A. 9th Cir. 1972), reversed on other grounds, 414 U. S. 141 (1973), held that the rule in *Chapman v. California,* 386 U. S. 18 (1967), that once the petitioner has established the infringement of a constitutionally protected right, the burden shifts to the state to show that the error was harmless, applied in federal habeas corpus actions. Accord: *Bailey v. MacDougall,* 392 F. 2d 155 (C. A. 4th Cir. 1968). *Cooper v. Picard,* 428 F. 2d 1351 (C. A. 1st Cir. 1970), held that once the petitioner demonstrates that a police station confrontation took place in the absence of counsel, the burden is on the state to show that the in-court idenitfication was independent of the tainted lineup. The court thus was applying the rule announced in *United States v. Wade,* 388 U. S. 218 (1967), to habeas corpus proceedings. In a footnote in *Wade* the Supreme Court, per Mr. Justice Brennan, adopted the rule espoused by Mr. Justice Murphy in dissent in *Goldstein v. United States,* 316 U. S. 114, 124, n. 1 (1942), that:

> "[A]fter an accused sustains the initial burden, imposed by *Nardone v. United States,* 308 U. S. 338, of proving to the satisfaction of the trial judge in the preliminary hearing that wire-tapping was unlawfully employed, as petitioners did here, it is only fair that the burden should then shift to the Government to convince the trial judge that its proof had an independent origin." 388 U. S. at 240.

Mr. Justice Murphy in *Goldstein* cogently set forth the rationale for such a shift in the burden of proof by quoting from the opinion of the Circuit Court of Appeals:

> "'. . . this should be the rule in analogy to the well settled doctrine in civil cases that a wrongdoer who has mingled the consequences of lawful and unlawful conduct, has the burden of disentangling them and must bear the prejudice of his failure to do so; that is, that it is unfair to throw upon the innocent party the duty of unravelling the skein which the guilty party has snarled. To impose the duty upon the prosecution is particularly appropriate here, for it necessarily has full knowledge of just how its case has been prepared; given a prima facie case against it, i. e., "taps" and some use of them, it should do the rest.' 120 F. 2d 485, 488." 316 U. S. at 124.

Absent controlling authority to the contrary from the Eighth Circuit Court of Appeals, I think that the position taken by the First Circuit in *Cooper* is correct, since the knowledge of whether the evidence was discovered by means of an independent source is peculiarly the prosecution's. Thus once the petitioner has shown that there was an illegal search which was a "but for" cause of the discovery of the evidence sought to be suppressed, the burden is on the respondent to show that the evidence was obtained by a source independent of the illegal search.[2]

The evidence before this court shows that the only basis for the arrest of the petitioner at the time he turned himself in was formed by the evidence discovered in the illegal search of his home. The only piece of evidence additional to the list of fifteen facts noted above that the police learned after the search and before the petitioner's arrest was that Duane Peak and David Rice had a protracted conversation in front of the NCCF headquarters

on the afternoon preceding the bombing. This fact and the facts known to the police before the search do not amount to probable cause to arrest the petitioner, since they would not warrant a man of reasonable caution to believe that the petitioner had either murdered or conspired to murder Officer Minard. Thus, the illegal search was clearly a "but for" cause of the arrest warrant for the petitioner.

The evidence also shows that the issuance of the arrest warrant was the "but for" cause of the petitioner's surrendering himself for arrest. The substantial remaining question is whether the petitioner's surrendering himself as he did is an independent source primarily responsible for the discovery of the dynamite particles. I am convinced that it is not, because the petitioner would not have done what he did were it not for the illegal search conducted by the police. See *Harrison v. United States,* supra. In that case the Supreme Court held that the petitioner's choice to take the stand to rebut the illegal introduction of statements obtained from him did not make that testimony on the stand an independent source purged of the illegality of the use of the statements. The government did not show that its illegal behavior did not impel the petitioner to take the stand and thus his testimony was tainted by the government's illegal behavior, since there was no showing that it was truly independent of the misconduct. Here, also, there is no showing by the respondent that the surrendering for arrest was not impelled by the illegal search. The record, in fact, affirmatively shows that the invalid arrest warrant (since based substantially on the illegal search) was what in fact induced the surrender for arrest. The fact that the petitioner turned himself in for arrest does not provide an independent source for the introduction of the dynamite particles.

There is, however, a further act of the petitioner which must be examined. Had the petitioner not chosen to wear the pants he did on the day he decided to turn himself in, the dynamite particles in question would not

have been found. Is this act sufficient to break the causal chain between the illegal search and the discovery of the dynamite particles? The resolution of this question is not without difficulty, but this court is convinced that the respondent has not met its burden of proof on this point. The record reveals that the petitioner's clothes were taken from the jail clothing room within a few hours of his arrest by a special investigator of the Alcohol, Tobacco & Firearms Division of the Internal Revenue Service who had participated in the illegal search, for the purpose of being sent to that Division's crime laboratory for analysis. It also shows that up to the time of the seizure of the clothing the only substantial evidence linking the petitioner to the homicide was that discovered in the illegal search. The record also shows that it was routine procedure to place the clothes of a jail prisoner in safekeeping. It does not reveal, however, that it was routine procedure to send all clothing to a crime laboratory for analysis. The most reasonable inference from the record before this court is that the clothing was sent to the crime laboratory for analysis because of the suspicions engendered by the illegal search. Such conduct amounts to obtaining the evidence by an exploitation of the illegal search. It is just such conduct that *Wong Sun* condemns. Thus, here, too, there is no independent source for the introduction of this evidence.

This court is aware of the decision in *Hancock v. Nelson,* 363 F. 2d 249 (C. A. 1st Cir. 1966), which held that since the illegal detention in the case before it had nothing to do with the presence of blood on the clothing taken from the defendant at the jail after his arrest, the clothing was admissible and not the fruit of the poisonous tree. A strong dissent by Chief Judge Aldrich viewed this position as clearly an erroneous statement of the law. I am of the opinion that Judge Aldrich was correct.

Nor is this case at all similar to *Agius v. United States,* 413 F. 2d 915 (C. A. 5th Cir. 1969). In that case the defendant was improperly stopped and questioned by the police about a robbery. During the course of the

questioning the defendant voluntarily went to his car to find a receipt that would give the address of a person who could support his alibi. While searching for the receipt, the defendant inadvertently exposed to the view of the officers a toy gun which was later introduced into evidence at his trial. The court held that such an admission was not erroneous since the defendant's voluntary act broke the chain between the illegal action and the discovery of the evidence. No such break is present in the case before me, because it was the illegal search, rather than any voluntary act of the petitioner, that prompted the taking of the petitioner's clothes for laboratory analysis.

Thus, it is clear that the discovery of the dynamite particles is not attributable to any source independent of the illegal search. From what has been said above it is also clear that the connection between the illegal search and the discovery of the evidence is not attenuated in the sense discussed in *Nardone v. United States,* supra. The causal relationship is direct and proximate between the illegal search and the petitioner's surrender for arrest and between the illegal search and the seizure of the petitioner's clothing by the Alcohol, Tobacco & Firearms Division investigator, who also had participated in the illegal search.

Some lower federal courts have developed a further limitation on the doctrine. If the evidence which was in fact discovered only through the illegal behavior inevitably would have been discovered by legitimate means, the evidence is admissible at trial. *Gissendanner v. Wainwright,* 482 F. 2d 1293 (C. A. 5th Cir. 1973); *United States v. Seohnlein,* 423 F. 2d 1051 (C. A. 4th Cir. 1970). Other courts have refused to accept this limitation. *United States v. Castellana,* 488 F. 2d 65 (C. A. 5th Cir. 1974). Whatever the merits of this limitation, it has no application to this case. Even if it were inevitable that the petitioner would have been arrested without the illegal search, it was not inevitable that when arrested he would have been wearing the clothing which contained the dynamite particles. It was not inevitable, therefore, that the

dynamite particles would have been discovered absent the illegal search.

Finally, there is some law to the effect that evidence that is indirectly discovered because of illegal police behavior should be admissible unless suppression of such evidence serves a deterrent purpose. *United States v. Kennedy,* 457 F. 2d 63 (C. A. 10th Cir. 1972); *Harrison v. United States,* 392 U. S. 219 (1968) (dissenting opinion of Justice White). I do not find this to be the law at this time, but even if it were, I find that suppression in this case would serve a deterrent purpose, since the relationship between the illegality and the evidence discovered is so direct that it would be reasonable to infer that the police could conduct an illegal search in order to secure the arrest of a person whose clothing and fingernails they wanted to examine. I am not saying that this was the motivation in this case. In fact, the evidence gives no indication that this played any conscious part in the decision to enter the petitioner's premises. In order to show that excluding evidence of this type would have some deterrent effect on illegal searches it is sufficient to find that one could reasonably foresee that the police could engage in an illegal search in order to discover evidence on the person or his clothing when arrested.

Therefore, it is the holding of this court that the dynamite particles s h o u l d have been suppressed since they were fruit of the illegal search.

Since it is clear that the introduction of the evidence seized in the illegal search and the dynamite particles substantially contributed to the petitioner's conviction, that introduction was not harmless error. Therefore, the petitioner must either be released from custody or granted a new trial free from the tainted evidence.

An appropriate order will be entered as of this date so directing.

Dated July 5, 1974.

BY THE COURT

/s/ Warren K. Urbom, *Chief Judge*

Footnote 1.—**United States v. Owen**, 492 S. 2d 1100 (C. A. 5th Cir. 1974); **United States v. Castellana**, 488 F. 2d 65 (C. A. 5th Cir. 1974); **United States v. Resnick**, 483 F. 2d 354 (C. A. 5th Cir. 1973); **Gissendanner v. Wainwright**, 482 F. 2d 1293 (C. A. 5th Cir. 1973); **United States v. Miles**, 468 F. 2d 482 (C. A. 3rd Cir. 1972); **United States v. Brandon**, 467 F. 2d 1003 (C. A. 9th Cir. 1972); **Carpenter v. United States**, 463 F. 2d. 397 (C. A. 10th Cir. 1972); **United States v. Kennedy**, 457 F. 2d 63 (C. A. 10th Cir. 1972); **United States v. Cassell**, 452 F. 2d 533 (C. R. 7th Cir. 1971); **United States v. Fike**, 449 F. 2d 191 (C. A. 5th Cir. 1971); **United States v. Jackson**, 448 F. 2d 963 (C. A. 9th Cir. 1971); **United States v. Bacall**, 443 F. 2d 1050 (C. A. 9th Cir. 1971); **United States v. Edmons**, 432 F. 2d 577 (C. A. 2nd Cir. 1970); **United States v. Seohnlein**, 423 F. 2d 1051 (C. A. 4th Cir. 1970); **Agius v. United States**, 413 F. 2d 915 (C. A. 5th Cir. 1969); **Swinney v. United States**, 391 F. 2d 190 (C. A. 5th Cir. 1968); **United States v. Ruffin**, 389 F. 2d 76 (C. A. 7th Cir. 1968); **United States v. Jackson**, 387 F. 2d 115 (C. A. 4th Cir. 1967); **Green v. United States**, 386 F. 2d 953 (C. A. 10th Cir. 1967); **Hancock v. Nelson**, 363 F. 2d 249 (C. A. 1st Cir. 1966); **Leek v. State of Maryland**, 353 F. 2d 526 (C. A. 4th Cir. 1965); **Wickline v. Slayton**, 356 F. Supp. 140 (U. S. D. C. E. D. Va. 1973).

Footnote 2. This court is aware that **Gissendanner v. Wainwright**, 482 F. 2d 1293 (C. A. 5th Cir. 1973), contains language which places the burden on the petitioner to show that it was solely through an invalid source that his identity was ascertained. This case is distinguishable, however, because the poisoned fruit which the petitioners sought to take from the government was not a piece of evidence but their very identity as the alleged perpetrators of the crime. As Chief Judge Brown correctly noted, the thrust of **Wong Sun** and **Silverthorne** is basically a rule of evidence prohibiting the introduction of certain evidence. Identity as alleged perpetrators is not itself a piece of evidence where, as in **Gissendanner**, the tainted source identifying the petitioners was not introduced into evidence. The only use of the tainted evidence in **Gissendanner** was that it initially fingered the petitioners. Such is not the case here. The dynamite particles were evidence and they were introduced into evidence. Thus they fall within the thrust of **Wong Sun** and **Silverthorne**.

In the United States District Court

For the District of Nebraska

David L. Rice,

Petitioner,

vs.

Charles L. Wolff, Jr., Warden of the Nebraska Penal and Correctional Complex,

Respondent.

ORDER

(Filed July 5, 1974)

CV72-L-303

In accordance with the accompanying memorandum of decision,

IT HEREBY IS ORDERED that the petition for writ of habeas corpus is granted and the petitioner is to be released from custody unless within 90 days of the date of this order or, if an appeal is taken, 90 days after the decision of the United States Court of Appeals for the Eighth Circuit, whichever is later, the State of Nebraska retries the petitioner.

Dated July 5, 1974.

BY THE COURT

/s/ Warren K. Urbom, *Chief Judge*

APPENDIX III

United States Court of Appeals
For the Eighth Circuit
St. Louis, Mo. 63101

Robert C. Tucker, Clerk

February 19, 1975

Mr. David L. Herzog
1431 First National Center
Omaha, Nebraska 68102

Mr. J. Patrick Green
707 City National Bank Building
Omaha, Nebraska 68102

Hon. Clarence A. H. Meyer
Attorney General
2119 State Capitol
Lincoln, Nebraska 68509

Mr. Frank G. Carrington
Suite 960 State National Bank Plaza
1603 Orrington Avenue
Evanston, Illinois 60201

Messrs. Glen R. Murphy and Paul Kellar
International Association of Chiefs of Police, Inc.
11 Firstfield Road
Gaithersburg, Maryland

Re: No. 74-1682. David L. Rice vs. Charles L. Wolff, Jr., etc.

Dear Sirs:

Enclosed is copy of order entered by us today at the direction of the Court.

Very truly yours,

/s/ Robert C. Tucker, *Clerk*

db
Enc.

United States Court of Appeals
For the Eighth Circuit

No. 74-1682

September Term, 1974

David L. Rice,
Appellee,

v.

Charles L. Wolff, Jr., etc.,
Appellant.

Appeal from the United States District Court
for the District of Nebraska

The Court having considered petition for rehearing en banc filed by counsel for appellant and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

February 19, 1975